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PRINCIPLES
OF
HINDU LAW.

BY

SIR WILLIAM H. MACNAGHTEN.

WITH

AN APPENDIX

CONTAINING

(1) INDIAN ACTS RELATING TO HINDU LAW

AND

(2) A SUMMARY OF HINDU LAW,

WITH

EXTRACTS FROM COWELL, STRANGE, COLEBROOKE, SHAMACHURN SIRCAR, GURUDAS BANERJEE, &c.,

AS WELL AS

EXAMINATION QUESTIONS ON HINDU LAW WITH APPROPRIATE ANSWERS,

AND

A COPIOUS INDEX.

COMPILED BY
PROSUNNO COOMAR SEN,
EDITOR, LEGAL COMPANION.

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PREFACE.

Macnaghten's "Principles of Hindu Law" is a book of recognized authority; but, in course of time, some portions of it have been rendered obsolete by statutory enactments, and some of the doctrines contained in it have been modified by judicial decisions. Since the publication of that work by Macnaghten, many valuable treatises on Hindu Law have been published, which contain doctrines which have either no place in his work, or have been very slightly touched upon by him. Hence, with a view to present to the public a compendium of the Hindu Law as it is at present administered within British India, I have made this compilation. It is needless to state that I have spared no pains to make it generally useful, and I shall feel myself amply rewarded if it meets with the kind approbation of the generous public, whose patronage is respectfully solicited.

P. C. SEN.

SERAMPORE :
The 1st July, 1880.

PRELIMINARY REMARKS.

So MUCH has, of late years, been written on the subject of Hindu Law, that any addition to the information already communicated may at first sight be regarded as altogether superfluous. In Bengal there has been recently published a work entitled "Considerations on Hindu Law" as current in that province; besides which, the stock of reported cases, involving questions connected with that law, has been very considerably augmented. In the publication called the "Elements of Hindu Law," we find a sketch of the jurisprudence in question conformably to the system in force at Madras, together with an appendix containing the replies of the Pundits (or, as they have been termed by the Compiler, the *responsa prudentum)* with reference to cases actually brought under litigation in the several civil courts subordinate to that presidency; while the Reports of Cases decided in the Sudder Adawlut at Bombay, and a work published at the same presidency under the appellation of "A Summary of Hindu Law," have afforded valuable information regarding the laws and customs of the Hindu population on that side of India. There still, however, remained a desideratum, which I have here endeavoured to supply. It still remained to state the law and its varieties as current throughout the extensive territories subject to the Presidency of Bengal, and to furnish a col-

lection of precedents of points already determined, which might serve as a safe, because an uninterested, guide to the correct decision of future and similar questions.

"If books and laws," observed Dean Swift, "continue to increase as they have done for fifty years past, I am in some concern for future ages, how any man will be learned, or any man a lawyer."* Such a complaint could not with justice be made of publications relating to the Hindu law, or of that law itself, to which there have been no modern additions, and our knowledge of which may be said to be as yet in its infancy. It is not likely that works on this subject will ever attain to an overwhelming number. Few men have leisure to become acquainted with the law in an English dress, and still fewer to study it in the original. The civil functionaries of this country, from the first moment of their entry into public life, for the most part find their time and attention so completely absorbed in the discharge of their indispensable and current official duties as to render it hopeless for them to attempt to acquire a knowledge of those laws which they are bound to administer. In such a state of things, it must be admitted, that any information which may be turned to account in practice, cannot but be eminently useful—nor does there appear to be any better method of solving judicial doubts than by resorting to decisions already passed,

* Thoughts on various subjects.

the accuracy of which may generally be admitted, and the impartiality of which can never be denied.

It has been my object in this work to fix doubtful points regarding which a contrariety of opinion has hitherto prevailed; and passages from the publications above alluded to have not unfrequently been cited in corroboration of the doctrines which I have adopted. Though I have satisfied myself, I am aware it by no means follows that others should be convinced with the same facility; but it is certainly true that questions of the highest importance, and which are of every-day occurrence, should be finally determined in one way or another. The mode is nothing: the determination is every thing. It matters little, for instance, to the community at large, whether a father shall be held to have the right of conferring his ancestral real property on one son, to the exclusion of the rest; but it is of the highest importance to every member of the community that the rights and privileges of each should, as far as practicable, be defined and established.

I apprehend that the Hindu law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of the Pundits has done more. It was remarked by Paley that, "after all the certainty and rest that can be given to points of law either by the interposition of the legislature or the authority of precedents, one principal source of disputations,

and into which, indeed, the greater part of legal controversies may be resolved, will remain still—namely, the competition of opposite analogies."* But this source of uncertainty should not exist in the system here treated of. The Pundits are called upon, not in the character of advocates to urge different analogies, but as faithful expositors of existing written law with relation to simple facts distinctly stated. There is not any contention of the bar in such matters, and there ought not to be the exercise of any ingenuity. It may seem harsh and unjust to pass an indiscriminate censure upon any body of men; but while I admit that there are not wanting among them individuals of unimpeachable honesty and profound erudition, I am still of opinion that to the Pundits is chiefly attributable the perplexity of the system which it is their province to expound. The difficulty of detection is tempting; and, where the law is perverted, the perversion is seldom so glaring as to admit of exposure by superficial inquiry. Authorities are frequently cited in support of a particular doctrine, which are, indeed, genuine passages of law, but applicable to a question wholly different from the subject-matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular province whose doctrine should have been adopted. Further facility for evasion is gained by the confusion between natural and

* Moral Philosophy, Book VI., Chap. 8.

civil obligations. This is the case in the Hindu law, especially as it obtains in the province of Bengal. It by no means follows that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible. That this should be the case in a system containing so much of ethical ingredients, is not to be wondered at; but the principle of legalizing a breach of positive prohibitions has been carried much further than could have been contemplated by the legislator. Every man is declared to be master of his own acquisitions. This is a maxim of law; but in the distribution of it, he should not show an undue preference to any individual member of his family. This is a precept of morality. By infringing the latter, the force of the former is not destroyed: consequently the undue preference in this case is not repugnant to law. But, on the other hand, a father and son have equal right to ancestral real property. This also is a maxim of law; and if an undue preference be shown in the disposition of this species of property, such act is not only at variance with moral precept, but is repugnant to the positive law. It has nevertheless been contended, as will be more fully shown in the body of this work, that such act, if done, must be considered as legal to all intents and purposes. This question has been discussed at some length in the present compilation; and though it is not to be expected that the conclusions I have formed in this and other instances should be considered as infallible

guides, yet the grounds whereon they rest have been severally given, which may tend to show whether they should be acquiesced in or rejected. I may, however, be permitted to add that these conclusions have not been arrived at without consulting books, and having recourse to the best available living authorities.

By section 15, Regulation IV., 1793, re-enacted for Benares and the Upper Provinces by Regulation VIII. of 1795, § 3, and Regulation III. of 1803, § 16, it is provided that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with regard to Hindus are to be considered as the general rules by which the judges are to form their decisions. Questions connected with the two first-mentioned points are frequently litigated in the established courts, while those originating in the last-mentioned sources of contention are for the most part adjusted by reference to private arbitration. These subjects have, therefore, been but slightly adverted to in the following pages, designed as the work is solely for the purpose of practical utility. The provision in the enactments above cited would appear to exclude cases of contract, evidence, and other miscellaneous matters; but there may be questions incidently involving these topics, and they may be so interwoven with cases which it is the duty of the courts to decide agreeably to the Hindu law, that attention to the principles of the one may be essential to the

due adjudication of the other. For instance, in a claim of inheritance, the defendant may plead a title by purchase, and the question will then arise as to how far the ancestor was at liberty to contract. So also in a case of disputed marriage, it may be a question as to how far the witnesses adduced in support of its validity may be considered competent or otherwise. This will involve some consideration of the law of evidence.

Ancient laws, pronounced to be obsolete in the present age, I have purposely omitted to mention of; such as the doctrines relative to the various descriptions of subsidiary sons, and those respecting the rights of sons by mothers of different classes, only three kinds of adoption being permitted or practised in the present age, and marriage with females of a different tribe prohibited. The subjects discussed in this work are those of Inheritance, Partition, Marriage, Adoption, Minority, Slavery, Contracts (including Debt, Gift, and Sale), and Judicial Proceedings, being a translation of an extract from the *Vyavahâramâtrica Prukurn* of the *Mitácshará*, including the Law of Evidence and Pleading. A considerable portion of this, especially the chapter on Ordeals, might perhaps have been omitted without material detriment to the utility of the work; but I was induced to add it for the gratification of curiosity, no entire version having yet been made, to my knowledge, of this topic of *Hindu* jurisprudence. On their Law of Bailments I have not

deemed it necessary to touch, as that subject has been amply discussed in the Digest translated by Mr. Colebrooke, and epitomes of the same are contained in the "Considerations on the Hindu Law" as current in Bengal, as well as in the work entitled "Elements of Hindu Law."

It will be conceded, I imagine, that the rules affecting succession are clear, simple, and copious; that provision is made for almost every case that can possibly arise; and, making allowance for the different opinions which prevail in the different schools, and for a few disagreements among authors of the same school on points of minor importance, that there can be but little room for hesitation, when a question respecting inheritance is litigated, and little reason to apprehend that an erroneous conclusion may be arrived at. In all codes, however, there must be some omissions which can only be supplied by analogy. From this defect the Hindu law cannot be expected to be altogether exempt. Where such cases occur, they doubtless furnish ample food for ingenuity, though in the course of my experience I have met with but few instances of the kind, and still fewer in which there could be any legitimate or reasonable ground to doubt as to which side of the argument the preference should be assigned. I will illustrate my meaning by mentioning a case in point, in which, though there is more to be said on both sides than in most others of a similar nature, there can be but little doubt as to the doctrine which should

be preferred. A man dies childless, leaving three widows him surviving. He gives permission to one of them to adopt a son after his death, which is done accordingly. The adopted son dies, also childless, leaving the three widows aforesaid him surviving. Now, the question is, to whom, on the death of such adopted son, will the property go? Should it be taken entirely by the widow who made the adoption, or should it be divided equally among the three widows? The law is silent as to this particular case: and those who contend that the property should be taken by the single widow do so on the ground that although, had there been no adoption, the three widows would have been entitled to equal shares, and although, had the childless husband adopted the boy during his lifetime, he could not have selected for him as adopting mother one of his three wives, and excluded the others from all maternal relation, yet that a boy having been adopted after the death of the husband, the estate to which he succeeded belongs of right to the widow who received him in adoption, to the exclusion of the other two, who can be considered in the light of step-mothers only. This reason seems plausible enough, but it is not the law. The three widows of the same man are held to be, in a legal point of view, one and the same individual. The widow to whom the permission was given may, indeed, have the privilege of selecting the boy to be adopted; but the adoption being once made, he necessarily holds the same relation to all the three widows of his adopting

father. I here merely allude to the rights and privileges accruing to the single widow from the simple fact of her having made the adoption, independently of any intention expressed or implied by the deceased that such widow alone should be considered as the mother of the adopted child. If he declared this explicitly, the case would be different; or if such may be reasonably gathered to have been his intention, from some unequivocal indication of his will that his other wives should have no concern with the adoption. But the simple fact of his having commissioned any one of the three to select the boy cannot be considered as sufficient to deprive the two others of their maternal rights, or to debar them from taking the shares to which they would have succeeded had no adoption taken place. Another case in point is that of a man dying survived by three widows, who take his property, and divide it among themselves, each taking a third. On the death of one of them, who is entitled to succeed to her property, the other widows, or the heirs male of her husband? The law is silent as to this point also. It is true that the law ordains the succession of the husband's heirs after the widow; but this rule does not contemplate the existence of other widows, and the weight of it is counterbalanced by another, which prescribes that the widow shall take the entire property, to the exclusion of the heirs of the husband; and, consequently, on the death of the first widow, the second and third take the share of which she died possessed, and, on the death of the second, the

entire property will devolve on the third; nor have the husband's heirs any legal claim until after her death. This proceeds upon the principle above-mentioned, that all the three widows of the same man are held to be, in a legal point of view, one and the same individual. Cases of this description might here be infinitely multiplied, but the foregoing will suffice for the present.

The Hindu law of partition contains one anomaly, which would at first sight appear unjust and absurd. I allude to that rule which entitles an idle brother to claim a share of the acquisitions of his industrious brethren—the drone to participate in the labours of the hive. But when the peculiar constitution of the Hindu society is considered, this provision will not be found to be altogether repugnant to justice or to reason. No respectable Hindu would travel in quest of employment without providing sufficient protection for the females of his family; and the individual usually selected for this purpose is one of the brethren, who resides without any active employment in the family-house, while the rest go in quest of service, and not unfrequently amass immense wealth, while the brother left behind has not advanced one step from his original state of poverty. But it would be hard to deny him a share of the good fortune which had attended his brethren, since it is evident that, unless some one had performed the part he undertook, they could not have acquired the wealth; and he may, therefore, be fairly held to have contributed his aid towards the

acquisition. It might also be affirmed that, had he engaged in a more active occupation, the same success would also have attended his endeavours. Where the patrimony has been used (however slight the use of it may have been) in making the acquisition, an idle brother, though not engaged in domestic duties, is entitled to participate likewise; but even in this provision there is reason. It could not be affirmed with certainty that the same sum extracted from the original stock might not have been turned to so good an account by him who had not, as by him who had, expended it. The sum so expended was the root and origin of the subsequent acquisition; and, as to its amount, it would obviously be impracticable to define what should and what should not be considered to constitute the use of the patrimony.

Questions connected with the connubial state are, as I before observed, but rarely brought into the courts of judicature under this Presidency. I have, therefore, refrained from expatiating on the subject. It can but rarely, if at all, in any of its bearings, form a topic of legal controversy. To those who are desirous of more full and particular information relative to this branch of Hindu economy, the labours of Ward may safely be recommended, as combining minuteness with accuracy in an eminent degree.

The law regarding adoption is deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindu jurisprudence more sur-

rounded by doubts and difficulties. Some of these I have endeavoured to clear up and remove; and if I have betrayed too much confidence in the attempt, I can only plead in excuse, that to speak dubiously where I had brought my own mind to conviction, would have defeated the object I had in view. Reduction to certainty, or to a point as nearly approaching to it as practicable in the absence of positive demonstration, was that object; but it will be for others to judge, having the evidence and the conclusion before them, whether the latter is consistent with the former. In all essential matters, it will be seen that the law of adoption among the Hindus assimilates closely to that which prevailed among the Athenians and the Romans. The points regarding which, in modern practice, the greatest disagreement has been evinced, are those relative to the proper age for adoption, the succession of the son adopted to the property of his adopting father's collateral relations, and the legality or otherwise of two successive adoptions.

In the case of minors, the Hindu legislature does not appear to have made any express provision against the rapacity of those interested in outliving them; but it was probably considered that by constituting the sovereign power the legal guardian of all infants, and by declaring them exempt from liability of whatever description, *durante minoritate*, sufficient safeguards had been established; that by the first would have been secured wisdom and caution in the selection of an immediate protector for the

person and property of the minior; and that by the second all pretence for the invasion of his interests would be removed.

I have not thought it requisite to discuss at much length the doctrine of slavery among the Hindus; but since hazarding a few observations on that topic, I have looked into Puffendorf's "Disquisition on Despotical Power,"* and find that he traces the origin of all servitude to contract. He observes that "in the early ages of the world, when men began to quit their primitive plainness and simplicity to cultivate the method of living, and to enlarge their fortunes and possessions, it is very likely the wiser and richer sort invited those of less parts and less wealth to assist them in their business for hire. Afterwards, when both parties found their benefit in this way of proceeding, the meaner tribes were by degrees persuaded to join themselves perpetual members to the families of the greater," &c. He then proceeds to argue that "the convenience of discharging inferior offices and labours by the hands of others being thus found out, in succeeding times, when wars grew pregnant in the world, it passed by degrees into a custom to indulge captives with life and corporal liberty upon condition that they should yield perpetual service to the conqueror." In this respect the learned jurist (as he himself admits) differs from many other high authorities; but it matters little whether slavery had its origin

* Book VI., Ch. 3.

in war or in peace. We know, at all events, that in proportion to the progress of the arts of peace, the evils of war are mitigated, and that it is only among the most uncivilized nations of the present day that success in war is considered as a just reason for making slaves of the captives.

Contracts are not required by the Regulations to be interpreted conformably to the principles of Hindu law, though it must occasionally so happen that a reference to this branch of jurisprudence will be found necessary for the adjustment of a dispute connected with the law of inheritance. In the chapter on minority, allusion is made to a case illustrative of this fact. In the case adverted to, the mother of a minor had sold his paternal landed property with a view to liquidate a debt which had been contracted by his father. On suit to set aside the sale, and to recover the estate in virtue of the right of inheritance, it became necessary to determine, in the first instance, how far the widow was competent to contract, under all the circumstances of the transaction; and the determination of this question obviously depended on the law by which the transferred estate was governed. The necessity of conforming to the Hindu law of contracts, had it been enjoined as the rule of decision in all their dealings, would not, perhaps, have furnished just cause of regret. The Supreme Court is required to administer justice to the Hindus in matters of contract agreeably to their laws and usages; and it has been remarked by one

of the Judges of that Court,* who had devoted no small portion of his time to the study of their code, and who was not by any means disposed to view it generally in a favourable light, that "if a prevalence of common sense is to be discovered in the laws of the Hindus, it must be sought for in that portion of them containing the precepts by which dealings between one man and another are to be regulated."

Of the version from the *Mitácshará* containing the Hindu doctrine relative to judicial proceedings, it remains to speak. Detached portions of this translation have already appeared in the work entitled "Considerations on Hindu Law," but I deemed it advisable to present the whole to the European reader in a connected form on this occasion. It will readily be perceived that the forms of administering civil justice were primitive, and compendious enough. Perspicuity and precision are continually enjoined in the pleadings, and litigation appears to have been attended with no expense. We have no means of ascertaining whether the operation of the system was efficient, but it probably sufficed for a population to whom the distinctions and refinements of commerce were unknown, and who appear to have never advanced beyond a certain point of civilization. There must always be a close analogy between the state of a society and its laws. Where the one is neither artificial nor progressive, the other, as a

* The author of the "Considerations on Hindu Law as current in Bengal."

natural consequence, will be simple and stationary. This is accordingly the case with the Hindus. For ages their national condition has undergone no change, and for ages their national code has continued undisturbed by reform or modification. The trial by ordeal, termed the *Divia Prumanum*, which may be translated *Judicium Dei*, forms a very prominent part of the system; but in this the Hindus are by no means peculiar, the purgation by ordeal seeming, as remarked by Blackstone, to have been very ancient and very universal in the times of superstitious barbarity. Throughout the whole of the chapter on judiçial proceedings, it would not be difficult to trace analogies between the Hindu and more enlightened codes of jurisprudence; but I do not possess sufficient qualifications for the task, nor would the result be profitable, even were it well executed. I have, therefore, contented myself with noting such as obviously suggested themselves to me while engaged in the version of the original.

There may be said to exist in the present day five distinct schools of Hindu law, which differ more or less from each other. They may be termed the schools of Bengal, of Benares, of Mithila, of the Dekhan, and of the Mahrattas. The original Smritis are, of course, common to all, but they each assign the preference to particular commentators and scholiasts. In Bengal, the works chiefly followed are the Dayabhaga of Jimutavahana, the Dayatatwa by Raghunandana, the Vyavaharatatwa by the same author, the Subodhini, a commentary on

the Dayabhaga, by Sricrishna Tarcalancara, the commentary on the same by Acharjia Chintamani, the Dayacramasangraha of Sricrishna, and the compilations termed the Vyavastharnava, the Vivadarnavasetu, and the Vivadabhangarnava. In Benares, the preference is shown to the Mitacshara of Vijnyaneswara, and its commentary by Veereshwara Bhatta and Balambhatta; the Veeramitrodaya by Mitramisra; the Parasuramadhava, and the Vyavaharamadhava. In Mithila, respect is paid chiefly to the following authorities:—the Vivadachintamani and Vyavaharachintamani by Vachaspatimisra, the Vivadaratnacara by Chandeswara, the Madanaparijata by Madanopadhyaya, the Dwaitaparisishta by Keshaba Misra, the Smritisara and Smritisamoochaya by Hurinathopadhyaya, and the Vivadachandra by Misroo Misra. The Mitacshara, the Smritichandrica, the Madhaveeya, and the Suraswativilasa are the works of paramount authority in the territories dependant on the government of Madras;* while the authorities chiefly referred to on the Bombay side are (besides the text books of Menu and Yajnyawalcya) the Vyavaharamayuc'ha, the Nirnayasindhoo, the Hemadree, the Vyavaharakoustoobha, and the Parasuramadhava.† I do not mean affirm that these are the only works of paramount importance recognized in the respective schools; but they are most frequently referred to; they are sufficient to solve the ordinary legal questions which

* See Preface to Elem Hin. Law, p. 14.
† See Preface to Summary of Hindu Law, p. 5.

arise; and suspicion may justly be excited, where an exposition of law is supported by citations from more recondite authorities. In questions relative to the law of adoption, the Dattacamimansa and Dattacachandrica are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares.

The Precedents contained in the second volume have been selected from an enormous mass of crude materials. When it is mentioned that I have examined every opinion that has been delivered in every court of judicature subordinate to the Presidency of Bengal from the year 1811 up to the present day, it may be a matter of wonder that the selections are not more numerous and more valuable. But the task of rejection has been found very laborious; at least nine-tenths of the opinions were ascertained, on examination, to be erroneous, doubtful, unsupported by proof, or otherwise unfit for publication; while, in not a few instances, the nature of the case itself was involved in obscurity, from the circumstance of the reply alone being forthcoming; the whole record of the case having been made over to the law-officer, with a view to enable him to find out, and report the law upon, the point or points at issue between the parties. The admitted opinions have been carefully examined; and they will, it is hoped, be in general found to have at least the merit of accuracy.

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ERRATA.

Page xiv	line 1.	*For*	"minior"	*read*	"minor"
„ 46	„ 21.	„	"incapacitated from"	„	"incapacitated for"
„ 55	„ 32.	„	"inferred from"	„	"inferred it from"
„ 165	„ 9	„	"of Hindus"	„	"of the Hindus"
„ 182 lines 32 & 33		„	"The completion," &c.,		According to Hindu law,
„ 183	„ 1 to 28		up to "majority."		minority lasts up to the

completion of the sixteenth year generally throughout India, except in Bengal, where it lasts up to the completion of the fifteenth year. But in s. 3 of the Indian Majority Act, 1875, it is laid down that—"Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X. of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before. Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

PRINCIPLES OF HINDU LAW.

CHAPTER I.

OF PROPRIETARY RIGHT.

PROPERTY, according to the Hindu law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes, amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land.* In a work of this kind, intended solely for the purpose of practical utility, it would be useless to attempt any inquiry as to the origin of the right of property according to the notions of the Hindus, or as to the nature of the tenures of real property in India. The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists.† It seems sufficient here to inquire into the nature of that property which is created by birth, for to this source must be traced all the impediments which exist to alienation;

Property is fourfold.

* *Jim. Va.*, cited in Dig., vol. iii., page 34.

† Is property included in the seven categories, substance and the rest, or is it distinct therefrom? *Jagannátha* in the Digest, vol. ii., page 506: and ownership, in his opinion, following the *Nyáya* doctrine, "is a relation between cause and effect, attached to the owner who is predicated, of particular substances, and subsisting in the substance by connection with the predicable."

a man without heirs having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise), conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle;* that is, by the death of the owner (natural or civil), or his voluntary abandonment.† In ancestral real property, the right is always limited; and the sons, grandsons, and great grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance,‡ are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his

Right of by inheritance how created.

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* *Sricrishna*, cited in the Digest, vol. ii., page 517.

† The fact of the ancestor being missing for a period exceeding twelve years constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewanny Adawlut on the 25th of April 1820 (Reports, vol. iii., page 28), wherein it was determined that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed; but some authorities maintain that the period varies with reference to the age of the missing person. See note to Case 7, vol. ii., page 9.

‡ Various diseases and various offences have been declared by the Hindu legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of objections which must in some instances be deemed irrational prejudices. The only reported case in which the question has been agitated may be found in the Bengal Reports, pages 108 and 257, vol. ii.; and in the Bombay Reports, page 411, vol. i., there is a case reported, in which a widow's claim to her husband's estate was disallowed on account of her blindness. For an enumeration of the disqualifying causes, see Digest of Hindu Law, page 298, vol. iii., and Elem. Hin. Law, App., page 335 *et seq.*, and the chap. vol. ii., treating of Exclusion from Inheritance, to the note in which an enumeration of the several disqualifying circumstances has been given.

descendants than to another.* With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.† The property of the father being thus restricted in respect of ancestral real property, and wills and testaments being wholly unknown to the Hindu law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime.‡ A will is nothing more or less than "the legal declaration of a man's intentions, which he wills to be performed after his death;" but willing to do that which the law has prohibited cannot be held to be a *legal* declaration of a man's intentions. There may be a gift in contemplation of death, but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindu system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos* may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law,

Restrictions on alienation.

Of wills.

* *Jagannátha* in Dig., vol. iii., page 45.

† *Vrihaspati*, Dig., vol. iii., page 32.

‡ For a more full discussion of the right of a Hindu to make a will, see Considerations on Hindu Law, p. 320, wherein the opinion of Mr. Colebrooke is introduced, to which the doctrine here laid down is conformable. See also the case of Huree Bullubh Gungaram *v.* Kesboram Sheodas, Bombay Reports, vol. ii., page 6, in which the plea of a will in opposition to the claims of heirs was treated as inadmissible and repugnant to the Hindu law, and the case of Sobharam Sumbhoodas *v.* Purmanund Bharechund, ibid, page 471; also the case of Musst. Goolaub *v.* Musst. Phool, vol. i., page 154; and that of Gungaram Viswunath *v.* Tappee Baee, ibid, page 372, and of Tooljaram Hurjeevun *v.* Hurbheram and another, ibid., 380; also App. Elem. Hin. Law, p. 9 *et passim*, and p. 405 *et seq.*

which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons by preferring one or excluding another without sufficient cause. This has been declared in the *Dáyabhága* to be a precept, not a positive law; and it is therein laid down that a gift or transfer under such circumstances is not null; "for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which declare the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right, though morally objectionable. Thus, a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the *Mitácshará* prevails (which does not recognize any several right until after partition, or the principle of *factum valet*), would undoubtedly be both illegal and invalid. But, according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each coparcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the case of Bhowancepershad Goh *versus* Musst. Taramunee, it

Doctrine of "*factum valet*" noticed.

To what cases applicable.

was determined by the Sudder Dewanny Adawlut that, according to the Hindu law as current in Bengal, a coparcener may dispose of, by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living;* while in the case of Nundram and others it was determined that, according to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's own share.† I am aware that cases have been decided in opposition to the doctrine for which I here contend. These I propose briefly to notice. The first on record is that of Rushiklal Dutt and Hurnaul Dutt, executors of the will of Mudunmohun Dutt *versus* Cheytunchurn Dutt, cited by Sir Thomas Strange, in his Elements of Hindu law.‡ He states, that the case was decided about the year 1789; that the testator, a Hindu, the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to the two younger ones, to the disherison of the two elder, of whom the second disputed the will; that on reference to the pundits of the court, they affirmed the validity of the will, their answers being short; and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the Elements adds: "The ground with the Pundits probably was (the Bengal maxim), that, however inconsistent the act with the ordinary rules of inhe-

Cases cited involving the doctrine of wills and unequal distributions.

* Sudder Dewanny Adawlut Reports, vol. iii., page 138. The same doctrine was held in the case of Ramkunhai Rai and others *v.* Bungchund Bunhoojea, ibid 17, and the subject is more fully discussed by Mr. Colebrooke in a note to vol. i., pp. 47 and 117.

† Case of Nundram and others *v.* Kashee Pande and others, Sudder Dewanny Adawlut Reports, vol. iii., page 232. The same doctrine was held in the case of Ooman Dutt *v.* Kunhia Singh, ibid, 144.

‡ Page 262.

ritance and the legal pretensions of the parties, *being done*, its validity was unquestionable." To this it can only be answered that the motives which actuated the Pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that, if such motives are allowed to operate, there must be an end to all law, the maxim of *factum valet* superseding every doctrine, and legalizing every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent.

The second case is that of Eshanchund Rai *versus* Eshorchund Rai, decided in the Sudder Dewanny Adawlut on the 23rd of February 1792.* In that case it was held that a gift, in the nature of a will, made by the *zemindar* of Nuddea, settling the whole of his *zemindaree* on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. The Pundits are stated to have assigned six reasons for this opinion, not one of which, except the last, appears entitled to any weight. The last reason assigned, namely, that a principality may lawfully and properly be given to an eldest son, is doubtless correct, and, taking a *zemindaree* in the light of a principality, is applicable, and would alone have sufficed to legalize the transaction. A principality has, indeed, been enumerated among things impartible. But, with respect to the other reasons assigned, they may be briefly replied to as follows. To the first, that, "according to law, a present made by a father to his son through affection, shall not be shared by the brethren," it may be objected that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "that what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift," that this supposes an acquisition in

* Sudder Dewanny Adawlut Reports, vol. i., page 2.

which no other person is entitled to participate, and not the case of an ancestral estate, in which the right of the father and son has been declared equal. To the third, "that a co-heir may dispose of his own share of undivided property," that his right to do so is admitted; but this does not include his right to alienate the shares of others. To the fourth, "that although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins, and the gift holds good," that the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in the ancestral estate. And to the fifth, "that *Raghunandana* in the *Dáyatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimutavahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing," that no such variance in reality exists. In addition to the above, it may be stated, that the suit in question was brought by an uncle against his nephew to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided.*

The third case is that of Ramkoomar Neaee Bachesputee *versus* Kishenkinker Turk Bhoosun, decided by the Sudder Dewanny Adawlut on the 24th of November 1812.† In that case it was maintained that the gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act (although an immoral one), according to the doctrine received in Bengal. To refute the opinion declared by the Pundits on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance

* See Appendix Elem. Hin. Law, page 437.
† Sudder Dewanny Adawlut Reports, vol. ii., page 42.

of the opposite doctrine. The following were the authorities cited in support of the above opinion: 1st. The text of *Vishnu* cited in the *Dáyabhága:* "When a father separates his sons from himself, his will regulates the division of his own acquired wealth." 2d. A quotation also from the *Dáyabhága:* "The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally; as *Yájnyawalcya* intimates: 'The father is master of the gems, pearls and corals, and of all (other moveable property); but neither the father nor the grandfather is so of the whole immoveable estate.' Since the grandfather is here mentioned, the text must relate to his effects. By again saying, "all" after specifying 'gems, pearls,' &c., it is shown that the father has authority to make a gift or any similar disposition of all effects, other than land, &c., but not of immoveables, a corrody, and chattels (i.e. slaves); since here also it is said 'the whole,' this prohibition forbids the gift or other alienation of the whole, because (immoveable and similar possessions are) means of supporting the family. For the maintenance of the family is an indispensable obligation, as *Menu* positively declares: 'The support of persons who should be maintained is the approved means of attaining heaven; but hell is the man's portion, if they suffer.' Therefore (let a master of a family) carefully maintain them. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family: for the insertion of the word 'whole' would be unmeaning (if the gift of even a small part were forbidden). The text of *Yájnyawalcya* cited in the *Prayushchitta-vivek:* "From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs punishment in the next world." An examination of the

authorities above quoted, as given by the law-officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply.

The fourth case is that of Sham Singh *versus* Musst. Umraotee, decided in the Sudder Dewanny Adawlut on the 28th of July 1813,* on which occasion it was determined that, by the Hindu law as current in Mithilá, a father cannot give away the whole ancestral property to one son to the exclusion of his other sons. The author of the "Considerations on Hindu Law," commenting on this decision, infers that the Sudder Dewanny Adawlut would not have entertained any doubt as to the validity of the gift, had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

The fifth case is that of Bhowannychurn Bunhoojea *versus* the Heirs of Ramkaunt Bunhoojea, which was decided in the Sudder Dewanny Adawlut on the 27th of December 1816,† and in which case it was ruled, that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. The question as to the father's power was thoroughly investigated on this occasion. There being a difference of opinion between the Pundits attached to the Sudder Dewanny Adawlut, the following question was proposed to the Pundits of the Supreme Court, Tarapershad and

* Sudder Dewanny Adawlut Reports, vol. ii., page 74.
† Ibid, page 202.

Mrityoonjyee, to Nurahurree, Pundit of the Calcutta Provincial Court, and Ramajya, a Pundit attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, moveable and immoveable, ancestral and acquired. Is such a gift valid according to the law-authorities current in Bengal, or not? and if it be invalid, is it to be set aside?"

The following answer, under the signatures of the four Pundits above mentioned, was received to this reference:—"If a father, whose elder son is alive, make a gift to his younger of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the donor acts sinfully. If, during the lifetime of an elder son, he make a gift to his younger, of all the ancestral immoveable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *à fortiori* invalid; inasmuch as he (the father) cannot even make an unequal distribution among his sons of ancestral immoveable property; as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (*i.e.* not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.

"Authorities in support of the above opinions.

1st. *Vishnu*, cited in the *Dáyabhága*:—"His will regulates the division of his own acquired wealth." 2d. *Yájnyawalcya*, cited in the *Dáyabhága*:—"The father is master of the gems, corals, pearls, and of all other moveable property." 3d. *Dáyabhága*:—"The father has ownership in gems, pearls, and other moveables, though inherited from the

grandfather, and not recovered by him, just as in his own acquisitions." 4th. *Dáyabhága*:—"But not so, if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion." Unlimited discretion is interpreted by *Sricrishna Tarcalancára* to signify a competency of disposal at pleasure. 5th. *Dáyabhága*:—"Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth." Commentary of *Sricrishna* on the above texts:—"Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." 6th. *Dáyabhága*:—"If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." In this passage, *Menu* and *Vishnu* declaring that "he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons, even against the father's will, in the case of hereditary wealth not acquired (that is, recovered) by him. 7th. *Dáyabhága*:—"When the mother is past child-bearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence; neither would that be right; for a text expresses: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dis-

sipation of their hereditary maintenance is ensured." *Sri-crishna* has interpreted "the dissipation of hereditary maintenance" to signify the being deprived of a share in the ancestral wealth. 8th. *Dwaitanirnaya* :—"If there be offspring, the parents have no authority over the ancestral wealth; and from the declaration of their having no authority, any unthorized act committed by them is invalid." 9th. Text of *Vijnyaneshwara*, cited in the *Medhatithi* :—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure. 10th. Text of *Nareda* :—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

I have given the above opinion, together with the authorities cited in its support, at full length, from its being apparently the most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived by the caprice of the father, of that in which the law has repeatedly and expressly declared them both to have equal ownership. The case of Ramkaunt is the latest reported decision by the Sudder Dewanny Adawlu connected with the point in question. Various cases have been cited by the author of the "Considerations,"* in which wills made by Hindus have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of Rajah Nobkishen, who, although he had a begotten and an adopted son, left an ancestral *talook* to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the others, the point of law was never touched upon, the parties hav-

* See the chapter on Wills, page 316 *et passim*.

ing joined issue on questions of fact. Upon the whole, I conclude that the text of the *Dáyabhága*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus, in Bengal, a man may make an equal distribution among his sons of his personally acquired property, or of the ancestral moveable property; because, though it has been enjoined* to a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all moveable property, and of his own acquisitions,† the maxim that a fact cannot be altered by an hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal.‡ The subject will be resumed in the chapter treating of Partition.

Ancestral real property cannot be alienated at pleasure.

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* *Catyáyana*, cited in Dig., vol. ii., page 540.

† *Yájnyawalcya*, ibid, page 159.

‡ Elements of Hindu Law, vol. i., page 123, and Appendix, chap. 1st; and see Bombay Reports, pages 154, 372, and 380, vol. i., and pages 6 and 471, vol. ii.

CHAPTER II.

OF INHERITANCE.

Of sons.

According to the Hindu law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. In former times the right of primogeniture prevailed to a certain extent; but that, with other usages, has been abrogated in the present or *Cali* age.* The right of representation is also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed, the term *putra* or son has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted

* See the case of Taliwur Singh *versus* Puhlwan Singh, Sudder Dewanny Adawlut Reports, vol. iii., page 203, wherein a claim of primogeniture being preferred, it was determined that priority of birth does not entitle to a larger portion. There is another decision on record (vol. ii., p. 116) of a case in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each (a distribution technically termed *putnibhaga*), averring that such had been the *koolachar*, or immemorial usage of the family; but the Court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons: being of opinion, that although, in cases of inheritance, *koolachar*, or family usage, has the prescriptive force of law, yet, to establish *koolachar*, it is necessary that the usage have been ancient and invariable. See also the case of Bhyroochund Rai *versus* Russoomunee, vol. i., page 27, and the case of Sheo Buksh Sing *versus* the Heirs of Futteh Sing, vol. ii., page 265. See also Elem. Hin. Law, App., page 288. In the succession to principalities and large landed possessions, long established *koolachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest (vol. ii., page 119), that the great possessions called *zemindarees* in official language, are considered by modern Hindu lawyers as tributary principalities.

son is a substitute for a son of the body, where none such exists, and is entitled to the same rights and privileges. Among the sons of the *Sudra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including sons' sons and grandsons), but only the son of a daughter, he is considered as a coheir, and takes an equal share.*

Of sons' sons.

In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

Of sons' grandsons.

In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.

Of the widow.

In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but, according to other schools, the widow succeeds to the inheritance in the former case only, an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal.† Much discussion has arisen respecting the nature of the tenure by which a widow holds property that had devolved upon her by the death of her husband; and certainly the law, in this instance, as in many others, admits of great latitude of interpretation. It is well known, that between the Bengal and the other schools, there is a difference of opinion as to the circumstances under which a widow has a

* *Mitac.*, chap. i., sec. xii., §§ 1 and 2.
† See Elem. Hin. Law, App., page 59.

right to succeed to the property of her deceased husband. By the law as current in Bengal, as has been already observed, she is entitled to succeed, whether the husband was living in a state of union with, or separation from, his brethren; by that of other schools, only where the husband was separated from his brethren. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life; for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of, her husband's relations, or possess the ability to expend more than they might deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her a nominal property, she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's rela-

tions. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction which prevails in the Benares school, which may be said to be the fountain and source of all Hindu law. By the provisions of that code, where the brothers are united with the deceased husband, and where consequently it is fair to presume a spirit of friendship and cordiality, and there is no reason to anticipate that the widow will be treated with neglect by the brothers, she is declared to have no right of succession. It is only where the family is divided, and where there might consequently be reason to apprehend a want of brotherly feeling, that the law deems it necessary to interpose, and protect her interests. And it may be here observed that, if a man die leaving more than one widow (three widows, for instance), the property is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

According to the doctrine of the *Smriti Chandrická*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, where the family is divided; but a childless widow takes only the moveable property. Where there are two widows, one the mother of daughters and the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided between them.

Of the daughter.

In default of the widow, the daughter inherits, but neither is her interest absolute. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male

issue, are together entitled to the succession;* and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

Distinction in the Benares school.

But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren, or a childess widow.

And in the Mithilá school.

According to the law of Mithilá, an unmarried daughter is preferred to one who is married: failing her, married daughters are entitled to the inheritance; but there is no distinction made among the married daughters; and one who is married, and has, or is likely to have, issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth.

And where the family is undivided.

It may here be mentioned that the above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for, according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them. But though the

* A distinction is made by *Sricrishna* in his commentary on the *Dáyabhága* in respect of unmarried daughters. He is of opinion that the daughter who is not betrothed is first entitled to the inheritance, and in her default the daughter who is betrothed; but this doctrine is not concurred in by any other authority, and the author of the *Dáyaruhasya* expressly impugns it as untenable.

schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *stridhun*, to her husband or other heir; and, according to the law of Bengal also, it reverts to her father's heirs.* In the case of Rajchunder Das *versus* Dhunmunee, it was determined that, according to the Hindu law as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter have or is likely to have male issue: and on her death without issue, her father's brother will inherit, to the exclusion of her husband.† But a curious case arose at Bombay,‡ involving the daughter's right, which deserves notice in this place. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion that the daughter was not entitled to succeed as heir, inasmuch as property which had devolved on a widow, reverts at her death to her husband's heirs, among whom the daughter would have ranked, in default only of her own brothers.

According to the law of Bengal and Benares, the daughter's sons inherit, in default of the qualified daughters; but the right of daughters' sons is not recognized by the Mithilá school. If there be sons of more than one daughter, they

* It has been asserted by the author of the Elements of Hindu Law, page 161, that property, devolved on a daughter by inheritance, is classed by the southern authorities as *stridhun*, and descends accordingly. The authority cited for this doctrine is to be found in that part of the *Mitácshará* treating of woman's peculiar property, and consequently applies to the descent of that alone. I have not been able to meet with any other.

† Sudder Dewanny Adawlut Reports, vol. iii., page 362.

‡ Elem. Hindu Law, Appendix, p. 392.

Of daughters' sons.

take *per capita*, and not as the sons' sons do *per stirpes*.* If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons;† and, if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters, or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail anywhere but in Bengal. The author of the Considerations on Hindu Law has stated the following case:—"If there be three sisters who succeed jointly to their father's estate, A, B, and C, and supposing A to die childless, and B and C to survive her. Supposing also B to have one son, and C to have three sons, and supposing C to have died before A, and B to have survived her; it is agreed that, upon the death of A, her estate will go to B; but whether on the death of B, it shall go to her *only* son, or be divided between him and the three sons of C, is *vexata quæstio*." In this case, I apprehend, that if the property had devolved on the daughters at the time they were maidens, then on C's death her pro-

* The same author states (page 160) that "where such sons are numerous, when they do take, they take *per stirpes*, and not *per capita*." But the reverse of this is proved by the authority cited in its favour, Dig., vol. iii., page 501. *Jagannátha* there lays down the following rule: "Again, if daughters' sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be alloted: they shall not first divide the estate in two parts, and afterwards allot one share to each son." This principle was maintained also in the case of Randhun Sein and others *v.* Kishenkaunt Sein and others, it being therein determined that grandsons by different mothers claiming their maternal grandfather's property take *per capita*, and not *per stirpes*. Sudder Dewanny Adawlut Reports, vol. iii., p. 100.

† Conformably to this doctrine, a case which originated in the *zillah* court of Rungpore was decided by the Sudder Dewanny Adawlut on the 19th of April 1820, in which it was determined (see Reports, vol. ii., p. 26) that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son.

perty would go to her three sons, and not to her sisters; but if they were married at the time, it would go to her sisters; and on the death of A, to B; and on the death of B, her son and the sons of C would take *per capita*, and this upon the general principle that property which had devolved on a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughters' sons, who are entitled to equal shares.* Under no circumstances can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go, as her *stridhun*, to her own heir.

In default of daughter's sons, the father inherits, according to the law as current in Bengal; but according to other schools,† the mother succeeds to the exclusion of the father.

Of the mother.

In default of the father, the mother inherits. Her interest, however, is not absolute, and is of a nature similar to that of the widow. In a case of property which had devolved on a mother by the decease of her son, the law-officers of the Sudder Dewanny Adawlut held that the rules concerning property devolving on a widow, equally affect property devolving on a mother.‡ On her death, the property devolves on the heirs of her son, and not on her heirs.

Of the brothers.

In default of father and mother, brothers inherit: first, the uterine associated brethren; next, the unassociated bre-

* *Jim. Vah.* in the *Dáyabhága*, chap. xi., sec. 1, §§ 65, ii.—See Case 5, Chap. Rights of Daughters, &c., vol. ii.

† The different opinions on this point have been more fully stated in the note to Case 14, Rights of Daughters, &c., vol. ii.

‡ Case of Musst. Bijia Dibia *v.* Unnapoorna Dibia, S. D. A. Reports, vol. i., p. 164.

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thren of the whole blood; thirdly, the associated brethren of the half blood; and, fourthly, the unassociated brethren of the half blood. The above order supposes that the deceased had only uterine or only half brothers, and that they were either all united or all separated. But, if a man die, leaving an uterine brother separated, and an half brother associated or re-united, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.

In a case recently decided in the Sudder Dewanny Adawlut, a question arose as to the relative rights of a brother and a brother's son to succeed, on the death of a widow, to property which had devolved on her at the death of her husband, they being the next heirs. The Pundits at first declared that a brother's son (his father being dead) was entitled to inherit together with the brother. But this opinion was subsequently proved and admitted to be erroneous. In the succession to the estate of a grandfather, the right of representation unquestionably exists; that is to say, the son of a deceased son inherits together with his uncle: not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the latter. In the case in question, the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing that, on the death of the first brother, the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and conse-

quently the brother who died during her lifetime could not have transmitted to his son a right which never appertained to himself.*

Of the brother's son.

In default of brothers, their sons inherit in the same order; but, in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brothers' sons alone as nephews, they take *per capita*, as daughters' sons do. In the *Subodhini* it is stated that the succession cannot, under any circumstances, take place *per capita*, but this opinion is overruled. He maintains, also, that daughters of brothers inherit. In this opinion he is joined by *Nanda Pandita*, but the doctrine is elsewhere universally rejected.†

And grandsons.

Distinction.

In default of brothers' sons, their grandsons inherit in the same order, and in the same manner,‡ according to the law as current in Bengal; but the law of Benares, Mithilá, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.

Thus far, with the exceptions above noticed, the several schools concur as to the order of inheritance; but they differ more considerably with respect to the remoter heirs, as will be noticed hereafter.

Of sisters' sons.

In default of brothers' grandsons, sisters' sons inherit, according to the law of Bengal; but according to other schools,

* Case of Rooderchunder Chowdhry *v.* Sumbhoo Chunder Chowdhry, Sudder Dewanny Adawlut Reports, vol. iii., page 106. The same doctrine was maintained in the case of Musst. Jymunee Dibia *versus* Ramjoy Chowdhry, ibid, 289.

† See note to *Mitácshará*, page 348.

‡ It may be here observed, however, that no re-union after separation can take place with a grandson's brother. Re-union can take place only with the three following relations: the father, the brother, and the paternal uncle. *Vrihaspati*, cited in the *Dáyabhága*, chap. xi., sec. 1, §§ 30.

the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Dewanny Adawlut, in which the suit being for the landed estate of a deceased Hindu situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled that, according to the law of Bengal, the plaintiff would be heir, but according to the law of Mithilá the defendant.*

There is a difference of opinion among different writers of the Bengal school as to the whole and half blood; some maintaining that an uterine sister's son excludes the son of a sister of the half blood; but, according to the most approved authorities, there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs.†

Of the other heirs according to the *Dáyacramasangraha.*

In default of sisters' sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dáyacramasangraha:* Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather;‡ the maternal uncle; his son and grandson, and daughter's son; the maternal

* Case of Rajchunder Narain *v.* Goculchunder Goh, S. D. A. Reports. vol. i., page 43. See also Case 6, page 125, vol. ii.

† *Nanda Pandita* and *Balambhatta* maintain that the daughters also of sisters have a right of inheritance, but their opinion is universally rejected on this point. See note to *Mitácsharà*, page 348. See also a case reported in Appendix, Elem. Hindu Law, page 249.

‡ It has been remarked by *Jagannátha* (page 530, vol. iii.) "that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the order of proximity, before the maternal grandfather;" but this opinion does not seem to be supported by any authority.

great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow-student;* those bearing the same family name; those descended from the same patriarch; Brahmins learned in the *Vedas;* and, lastly, to the king, to whom, however, the property of a Brahmin can never escheat, but must be distributed among other Brahmins.

The above order of succession, however, is by no means universally adhered to, even among the writers of the Bengal school. After the sister's son, *Sricrishna Tarcálancara,* in his commentary on the *Dáyabhága,* places the paternal uncle of the whole blood; the paternal uncle of the half blood; the son of the paternal uncle of the whole blood; the son of the paternal uncle of the half blood; their grandsons successively; the paternal grandfather's daughter's son; the paternal grandfather; the paternal grandmother; the paternal grandfather's uterine brother; his half brother; their sons and grandsons successively; the paternal great-grandfather's daughter's son; the *Sapindas;* the maternal uncle and the rest, who present oblations which the deceased was bound to offer; the mother's sister's son; the maternal uncle's sons and grandsons; the grandson of the son's son, and other descendants for three generations in succession; the offspring of the paternal grandfather's grandfather, and other ancestors for three generations; the *Samanodacas;* and, lastly, the spiritual teacher, &c., &c.

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* See a Bombay case cited in Elem. Hindu Law, Appendix, page 257, in which it was determined that a fellow-hermit is heir to an anchoret; his pupil to an ascetic; and his preceptor to a professed student of theology.

And according to other authorities.

The series of heirs is thus stated by the compilers of the *Vivádarnavasetu* and *Vivádabhangárnava.** After the sister's son, the grandfather, next the grandmother; and afterwards the enumeration proceeds as follows: Uncle—Uncle's son, grandson, and great-grandson—Grandfather's daughter's son—Great-grandfather—Great-grandmother—Their son, grandson, great-grandson, and daughter's son—Maternal grandfather—Maternal uncle, his son and grandson—The deceased's grandson's grandson (in the male line), his great-grandson, and his great-great-grandson. Then the ascending line succeed, namely, the paternal great-grandfather's father, his son, grandson, and great-grandson.†

The above cited four authorities are of the greatest weight in the province of Bengal; and where they differ, reliance may with safety be placed on the *Dáyacramasangraha* of *Sricrishna.*‡ It will be observed, however, that all these authorities concur in the order of enumeration as far as the sister's son, which perhaps is all that will be requisite for practical purposes; and it would be but a waste of time to enter into any disquisition as to the differences of opinion entertained by writers of inferior importance.

Order of succession according to the Benares school.

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified.

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* Among modern digests, the most remarkable are the *Vivádarnavasetu*, compiled by order of Mr. Hastings; *Vivádasararnava*, compiled at the request of Sir William Jones; and the *Vivádabhangárnava*, by *Jagannátha.*—Colebrooke's Preface to Digest, page 23.

† *Jagannátha* so far differs from the series here given, that he assigns a place next to the maternal uncle's grandson to the maternal great-grandfather and the maternal great-great-grandfather and their descendants. He also is of opinion that of the male descendants of the paternal grandfather and great-grandfather, those related by the whole blood should exclude those of the half blood.

‡ See the opinion of Mr. Colebrooke, cited in Elem. Hindu Law, Appendix, 261.

But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivádachandra*, the *Vivádaratnacara*, and *Vivádachintámani*, authorities which are current in Mithilá, do not enumerate the daughter's son among the series of heirs.* The mother ranks next in the order of succession,† and after her the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood.‡

In their default, their sons inherit successively;§ then the paternal grandmother;‖ next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother;¶ the

* According to the commentary of *Balambhatta*, the daughter's daughter inherits, in default of the daughter's son; but this is not the received opinion: and in a case decided by the Court of Sudder Dewanny Adawlut according to the law of Bengal (Sudder Dewanny Adawlut Reports, vol. ii., p. 290), it was determined, where two or four daughters died during the lifetime of their mother, and one of them left a daughter, which daughter sued her aunts for a fourth of the property in right of her mother, that there was no legal foundation for the claim.

† The same commentator says, the father should inherit first, and then the mother. *Nanda Pandita*, the author of a commentary on the *Mitácshará*, concurs in the opinion of *Balambhatta*. *Aparaca*, another commentator, *Camalacara*, the author of the *Vivádatandava*, the authors of the *Smritichandrická Madana Rutna*, *Vyavahâramayu'cha*, *Vivádachandrica*, *Rutnacara*, and other authorities current in Benares, give the father the preference over the mother, and *Jimutavahana*, *Raghunandana*, and all other Bengal authorities adopt this doctrine; but all the other Benares authorities follow the text of the *Mitácshará*, which assigns the preference to the mother, while *Sricara* maintains that the father and mother inherit together.

‡ *Balambhatta* is of opinion that brothers and sisters should inherit together; but this doctrine is not received.

§ And, according to *Balambhatta*, brothers' daughters and brothers' sons inherit together; but neither is this opinion followed.

‖ *Sricara Acharjya* maintains that the brothers' grandsons have a title to the succession in default of the brothers' sons; and this opinion is also held by the author of the *Vivádachandrická*, but by no other authority; and there is the same difference of opinion, as to the relative priority of the grandmother, as has been noticed in the case of the father and mother.

¶ The same difference of opinion exists in this case also.

paternal grandfather, his son and grandson successively; the paternal great-grandfather's mother;* his father, his brother, his brother's son. In default of all these, the *Sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *Sapindas*, the *Samanodacas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree.† In default of the *Samanodacas*, the *Bundhoos* or cognates succeed. These kindred are of three descriptions: personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.‡ In default of them, the *Acharjya* or spiritual preceptor, the pupil, fellow-student in theology, learned Brahmins; and, lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

The order of succession as it obtains in Mithilá corresponds with what is here laid down. In the case of Gungadutt Jha *v.* Sreenarain and Musst. Leelawutee (Sudder Dewanny Adawlut Reports, vol. ii., page 11), it was determined that, according to the law as current in Mithilá, claimants to

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* And in this case.

† The term *Gotraja* (or gentiles) has been defined to signify *Sapindas* and *Samanodacas* by *Balambhatta*, and in the *Subodhini*, &c.

‡ See *Mitácshará*, page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but *Vachespatimisra* in the *Vivádachintámani* assigns to "the maternal uncle and the rest" (*Matooladi*) a place in the order of succession next to the *Samanodacas;* and *Mitramisra*, in the *Veeramitrodaya*, expresses his opinion that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy.

inheritance, as far as the seventh *(Sapindas)* and even the fourteenth in descent *(Samanodacas)* in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor; that is to say, his mother's sister's son. Had the case in question been decided according to the law of Bengal (which, the parties there residing, would have so happened, had it not been determined that a person settling in a foreign district shall not be deprived of the laws of his native district, provided he adhere to its customs and usages), the mother's sister's son would have obtained the preference; that individual ranking, agreeably to the law of Bengal, between the *Sapindas* and the *Samanodacas*, as was exemplified in the case of Roopchurn Mohapater *v.* Anund Lal Khan (Sudder Dewanny Adawlut Reports, vol. ii., page 35), in which it was determined, according to an exposition of the Hindu law as current in Bengal, that the son of a maternal uncle (who is also a *Bundhoo*) takes the inheritance in preference to lineal descendants from a common ancestor, beyond the third in ascent.

According to other schools.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavahāramayūc'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated: The brother of the whole blood, his son, the paternal grandmother, the sister,* the paternal grandfather, and the brother of the half blood, who inherit

* The Bombay Reports, vol. ii., page 471, exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the lifetime of their uncle's sister. There is another similar case in vol. i., page 71. But this admission of the sister seems peculiar to the doctrine followed on that side of India. See Colebrooke, cited in Appendix, Elem. Hindu Law, page 252.

together. In default of these, the *Sapindas*, the *Samanodacas*, and the *Bundhoos* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all the schools, that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule; for instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter.* The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together do not imply that the mere act of celebrating the funeral rites gives a title to the succession, but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him.†

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* Elem. Hin. Law, App., pages 245 and 251.
† Note to S. D. A. Reports, vol. i., p. 22.

CHAPTER III.

OF STRIDHUN, OR WOMAN'S SEPARATE PROPERTY.

This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

In the *Mitácshará*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The most comprehensive definition of a married woman's *peculium* is given in the following text of *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold separate

Definition of *stridhun* according to *Menu*.

* According to the Hindu law, there are several sorts of this species of property, some of which are as follows: *Adhyagnica*, or what was given before the nuptial fire; *Adhyabahana*, or what was given at the bridal procession; *Preetidutta*, or what was given in token of affection; *Mátripitri* and *Bhrátridutta*, or what was received from a mother, father, and brother; *Adhividhanica*, or a gift on a second marriage, *i.e.*, wealth given by a man for the sake of satisfying his first wife, when desirous of espousing a second; *Paranayayung*, or *paraphernalia*, *Anwadhayica*, or gift subsequent; *Sowdayica*, or gift from affectionate kindred; *Sulca*, or perquisite; *Yautuca*, or what was received at marriage; *Padabundanica*, or what was given to the wife in return of her humble salutation. Some lawyers class the *Preetidutta* and the *Padabundanica* as one species of woman's property, under the appellation of *Lavanyarjita*, or was gained by loveliness.

property of a married woman."* And it may be here observed that *stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance: for instance, property given to a woman on her marriage is *stridhun*, and passes to her daughter at her death; but at the daughter's death it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

Succession to.

Where the deceased was unmarried;

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively; and failing these, her paternal kinsmen in due order.

And where married.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first, and then the married daughter likely to have male issue.† The barren and the widowed daughters, failing the two first, succeed as coheirs. In default of daughters, the son succeeds; then the daughter's son,‡ the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the five first forms,§ the husband succeeds, and the brother, the mother, the father. But if cele-

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* § 305.

† It may here be mentioned that at the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having, and likely to have, male issue; and in their default, on the barren and widowed daughters.

‡ According to *Jimutavahana*, the right of the daughter's son is postponed to that of the son of the contemporary wife; but his opinion in this respect is refuted by *Sricrishna* and other eminent authorities.

§ For an enumeration of these forms, see the chapter on Marriage.

brated according to any of the three last forms,* the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in-law, the father-in-law, the elder brother-in-law, the *Sapindas*, the *Saculyas*, the *Samanadocas*.

And if given to her by her father.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are, successively, a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

And if not given to her by her father.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son.†

Power of a woman over her *stridhun*.

It may here be observed that the Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition

* The justice of the order of succession does not at first sight seem obvious, at least as regards the *Asura* marriage, where money is advanced by the family of the bridegroom, and to which, therefore, it would appear equitable that it should revert on the death of the bride.

† But *Raghunandana* holds that in the case of a married woman dying without issue, the husband alone has a right to the property of his wife, bestowed on her by him after marriage; but that the brother has in such case the prior right to any property which may have been given to her by her father and mother.

at pleasure. He has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.*

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* The order above given is chiefly taken from Colebrooke's translation of the *Dáyabhága*, page 100. I do not find that the law in this particular varies materially in the different schools, except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools between wealthy and indigent daughters. There are also many other nice distinctions and discrepancies of opinion, of which the following are specimens, and which it is unimportant to notice at greater length in this place. According to *Jimutaváhana* and the mass of Bengal authorities, the property of a deceased woman not received at her nuptials, and not given to her by her father, goes to her son and to her unmarried daughters in equal portions, whether the latter have been betrothed or otherwise. *Jagannátha* is of opinion that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, and that both cannot have an equal right to inherit with a brother. *Raghunandana* denies that there is any text justifying the succession of a betrothed daughter. The authors of the *Vyavaháramayúc'ha* and *Veeramitrodaya* distinctly state that, in default of a maiden daughter, a married one, whose husband is living, takes the inheritance with her brother. According to the *Mitácsharà* and other ancient authorities current in Benares, the brothers and sisters cannot, under any circumstances, inherit together; while *Madhaváchárjya* states that sons and daughters inherit their mother's *peculium* together, only where it was derived from the family of the husband; and *Vachespati Bhuttáchárjya*, on the other hand, contends that they inherit simultaneously in every instance, excepting that of property received at nuptials, and given by parents. The conflicting doctrines in matters such as the above, of minor moment, might be multiplied almost *ad infinitum*.

CHAPTER IV.

OF PARTITION.

Having treated of the subject of property acquired by succession, it remains to treat of that which is acquired by partition while the ancestor survives, and by partition among the heirs, after succession.

Father's consent requisite to partition in Bengal.

The father's consent is requisite to partition, and, while he lives, the sons have not, according to the law of Bengal, the power to exact it, excepting under such circumstances as would altogether divest him of his proprietary right, such as his degradation, or his adoption of a religious life. *Jagannátha* has, indeed, expressed an opinion, that sons, oppressed by a step-mother or the like, may apply to the king, and obtain a partition from their father of the patrimony inherited from the grandfather, though not a partition of wealth acquired by the father himself. To the father's right of making a partition there is but one condition annexed, namely, that the mother be past child-bearing, and this condition applies to ancestral immoveable property alone; as to his self-acquired estate, whether it consists of moveable or immoveable property, and the ancestral property of whatever description which may have been usurped by a stranger, but recovered by the father, his own consent is the only requisite to partition. But the law as current in Benares and other schools differs widely from that of Bengal in respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the sons if the mother be incapable of bearing more issue, even though the father retain his worldly affections, and though he be averse to partition.*

Exception.

Opinion of *Jagannatha.*

Condition.

Partition of ancestral estate demandable by sons according to the law of Benares.

* *Mitac.*, ch. i., sec. 2, § 7.

How to be made by the father according to the law of Bengal.

According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively, as well as of moveable ancestral property, and of property of whatever description, recovered by himself, retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he without just cause exclude any one of his sons, the act is valid, though sinful; not so with respect to the ancestral immoveable estate and property, to the acquisition of which his sons may have contributed; of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.

And Benares.

The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself; and as the maxim of *factum valet* does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illegal.*

This subject has been treated of at great length by the author of the Considerations on Hindu Law, in the chapter on gifts and unequal distribution; and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion that a gift of even the entire ancestral immoveable property to one son, to the exclusion of the rest, is sinful, but neverthless *valid*, if made. It must be recollected that he was treating of the law as current in Bengal

* Though the father is not precluded from disposing of moveables at his discretion, a *gift* of such property to one son should not be deemed invalid (Colebrooke, cited in Elem. Hin. Law, App., p. 5); and as to the father's incompetency to dispose of immoveable property, though acquired by himself, see ibid, p. 7.

only, and not elsewhere. My reasons for arriving at an opposite opinion are: first, because the doctrine for which I contend has been established by the latest decision, founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and, secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Dáyabhága*:—"The texts of *Vyása* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts." Now, if these passages are to be taken in a general sense; if they are to be held to have the effect of legalizing, or at least rendering valid, all acts committed in direct opposition to the law, they must have the effect of superseding all law; and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts clearly shows the spirit in which this unmeaning, though mischievous, dogma was delivered; he declares that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brahmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or, in other words, that the defunct Brahmin cannot be brought to life again. The illustration might be apposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of *Vyása* in question occur in the chapter of the *Dáyabhága* which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might

Argument against unequal partition in certain cases.

be prejudicial to the interests of his son, I would merely refer to the provision contained in chap. iii., sect. 7, § 10, of the translation of the extract from the *Mitácshará* relative to judicial proceedings. The rule is in the following terms: "The ownership of father and son is the same in land which was acquired by his father," &c. From this text it appears that "in the case of land acquired by the grandfather, the ownership of father and son is equal; and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation as to who are fit parties in judicial proceedings; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized, yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will lie against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

Cases cited.

The question as to the extent to which an unequal distribution made by a father in the province of Bengal should be upheld has been amply discussed also in the report of a case decided by the Court of Sudder Dewanny Adawlut in the year 1816,* wherein it was determined that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, that the validity of an unequal distribution of ancestral

* For the whole of the argument, see Sudder Dewanny Adawlut Reports, vol. ii., page 214.

immoveable property, such as is expressly forbidden by the received authorities on Hindu law, cannot be maintained on any construction of that law, by *Jinutaváhana* or others. *Jagannátha*, in his Digest, maintains an opinion opposite to this, and lays it down that, if a father, infringing the law, absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive: and admitting this doctrine to be correct, it must be inferred, *à fortiori*, that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to.

Opinion of *Jagannátha* over-ruled.

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. According to *Jimutaváhana*, *Raghunandana*, *Sricrishna*, and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinátha* is, that if the father reserve two or more shares, no share need be assigned to the wives, because their maintenance may be supplied out of the portion reserved. It is also laid down in the *Vivádárnavasetu* that an equal share to a wife is ordained in a case where the father gives equal shares to his sons; but that, where he gives unequal portions, and reserves a larger share for himself, he is bound to allot to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son. These shares to wives are allotted only in case of no property having been given to them. According to some authorities, if she had received property elsewhere, a moiety of a son's share should be allotted to her; but according to other authorities, the difference should be made

Right of sons born after partition.

Childless wives entitled to share according to Bengal authorities.

Opinion of *Harinátha*

Vivádárnavasetu.

up to them between what they have received and a son's share. The doctrine maintained by *Jagannátha* is, that if the wife has received, from any quarter, wealth which would have devolved ultimately on her husband, such wealth should be included in the calculation of her allotment; but if she received the property from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein.

Rule where the wife has received property.

The law as current in Benares, Mithilá, and elsewhere, differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vijnyaneswara* ordains: "When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or father-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share: "or if any had been given, let him assign the half." According to *Madhavácharjya*, if the father by his own free will make his sons equal participants, he ought to make his wives, to whom no separate property has been given, partakers of a share equal to that of a son; but if such property has been presented to her, then a moiety should be given. *Cumulacara*, the author of the *Vivádatandava*, declares generally that, whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipacalica*, maintains that, if the father make an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue: and *Helayudha* also lays it down that wives who have no sons are here intended. *Misra* contends that "when he reserves the greater part of his fortune, and gives some trifle to his sons, or takes a double share for himself, the husband must give so much wealth to his wives out of his own share alone;

Doctrines of the Benares and other schools as to the shares of wives.

accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition." The sum of the above arguments seems to be, that in the case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions; that, where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and that, where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property.

Sum of the arguments.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and, according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease.* Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jimutavahana*, has nevertheless been maintained by more modern authorities, and is universally observed in practice.†

Partition when to be made by brethren.

Nephews whose fathers are dead are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes*, and any one of the co-parceners may insist on the partition of his share.‡

Rights of nephews.

* See note to the case of Bhyroochund Rai *v.* Russoomunee, Sudder Dewanny Adawlut Reports, vol. i., p. 28, and case of Nilkaunt Rai *v.* Munee Chowdrain, ibid, 58; also case of Rani Bhawani Dibia and another *v.* Ranee Soorujmunee, ibid, p. 135. The reverse is the case, according to the law of Benares. See the case of Duljeet Sing *v.* Sheomanook Singh, ibid, 59.

† Dig., 3, 78.

‡ *Catyáyana*, cited in Dig., 3, 7; and see Elem. Hindu Law, Appendix, 292.

Of mothers & daughters.

But, in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but according to the *Mitácshará* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smritichandrica* is the only authority which altogether excludes a mother from the right of participation. To the unmarried daughters such portions are allotted as may suffice for the due celebration of their nuptials.* This portion has been fixed at a fourth of the share of a brother: in other words, supposing there is one son and one daughter, the estate should be made into two parts, and one of those two parts made into four. The daughter takes one of these fourths. If there be two sons and one daughter, the estate should be made into three parts, and one of these three parts made into four. The daughter takes one of these fourths, or a twelfth. If there be one son and two daughters, the estate should be made into three parts, and two of those three parts made into four. The daughters take each one of these fourths.† But according to the best authorities, these proportions are not universally assignable; for where the estate is either too small to admit of this being given without inconvenience, or too large to render the gift of such portion unnecessary to the due celebration of the nuptials, the sisters are entitled to so much only as may suffice to defray the expenses of the marriage ceremony.

Sisters interests undefined.

In fine, this provision for the sisters, intended to uphold the general respectability of the family, is accorded rather as a matter of indulgence, than prescribed as a matter of right.‡

* Ibid, 86 and 97.

† *Mit.* on Inh., chap. i., § 7.

‡ The question has been fully discussed by the author of the Considerations on Hindu Law, page 103 *et seq.* The inconsistency of the rules has been pointed out: but the same conclusion is arrived at, namely, that the sister's is a claim rather than a right. See the opinion of Mr. Sutherland, cited in Elem. Hin. Law, App., p. 301, which is to the same effect; and of Mr. Colebrooke, ibid, pp. 361 and 385.

Any improvement to joint property effected by one of the brethren does not confer on him a title to a greater share;* but an acquisition made by one, by means of his own unassisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewanny Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other three.† But according to the law as current in Benares, the fact of one brother's having contributed personal labour, while no exertion was made by the other, is not a ground of distinction. If the patrimonial stock was used, all the brethren share alike.‡ If the joint stock have not been used,§ he by whose sole labour the acquisition has been made is alone entitled to the benefit of it.‖ And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition.¶ The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.** It has also been ruled that, if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share; and that, if they

Share of the acquirer.

According to the law of Benares.

Case of land recovered.

* *Mitac.*, chap. i., sec. 3, § 4; and Case 15, vol. ii., Chap. Effects liable and not liable to Partition (note).

† S. D. A. Rep., vol. i., page 6.

‡ See note to Case 4, Chap. of Sons, &c., vol. ii.

§ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits. See Elem. Hin. Law, App., p. 306.

‖ Dig., 3, 110.

¶ Kaleepershad Rai and others *v.* Digumber Rai and others, S. D. A. Reports, vol. ii., p. 237.

** *Sancha*, cited in ibid, 365; and Elem. Hin. Law, App., p. 313.

were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity than any specific rule of Hindu law.*

Property not subject to partition.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition; and there are some things not subject to the ordinary law of partition; but for a more detailed account of indivisible and specially partible, the reader is referred to the translation of *Jagannátha's* Digest, vol. iii., page 332 *et seq.*, and to the chapter in vol. ii., treating of effects liable and not liable to partition. According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property: in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation; but such undivided residue will go exclusively to the brother.†

Evidence of partition.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property: though it undoubtedly is one among the presumptive proofs to which recourse may be had, in a case of uncertainty, to determine whether a family be united or

* Case of Koshul Chukrawutee *v.* Radhanauth, S. D. A. Reports, vol. i., page 336.

† Elem. Hin. Law, App., p. 322.

separate in regard to acquisitions and property.* The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show that they have no dependance on or connexion with each other.† In case of an undivided Hindu family the Court of Sudder Dewanny Adawlut were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the *onus probandi* resting with the party claiming exclusive right;‡ and, in another case, a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profits and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquisition made by others of the family.§ The law is particularly careful of the rights of those who may be born subsequent to a partition made by the father. With respect to ancestral property, it is not likely that the just claims of any of the heirs can be defeated, as the law prohibits partition so long as the mother is capable of bearing issue; but to guard against the possibility of such an occurrence, it is provided that the father shall retain two shares, to which shares, if a son be subsequently born, he is exclusively entitled. There is another provision also which forms an effectual safeguard against the destitution of children born subsequently to a partition, which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.||

* See note to S. D. A. Reports, vol. i., p. 36.

† Dig., 3, 414; and see cases, Chap. of Evidence of Partition; also Colebrooke, cited in Appendix Elem. Hindu Law, p. 325 *et seq.*

‡ Case of Gourchunder Rai and others *v.* Hurrochunder Rai and others, S. D. A. Reports, vol. iv., p. 162.

§ Rajkishor Rai and others *v.* the widow of Santoo Das, S. D. A. Reports, vol. i., p. 13.

|| See Precedents, Case 3, Chap. of Partition, vol. ii.

CHAPTER V.

OF MARRIAGE.

On the subject of marriage, it may be presumed that it has not often constituted a matter of litigation in the civil courts, from the circumstance that points connected with it do not appear to have been referred to the Hindu law-officers. Disputes connected with this topic, as well as those relating to matters of caste generally, are, for the most part, adjusted by reference to private arbitration. It is otherwise in the provinces subject to the presidencies of Madras and Bombay, where many matrimonial disagreements and questions relative to caste have been submitted to the adjudication of the established European courts.* As, however, questions relative to marriage are among those which the Company's courts are, by law, called upon to decide, it may not be amiss to cite some of the fundamental rules connected with the institution.

Marriage, among the Hindus, is not merely a civil contract, but a sacrament, forming the last of the ceremonies prescribed to the three regenerate classes, and the only one for *Sudras*;† and an unmarried man has been declared to be incapacitated from the performance of religious duties.‡ It is well known that women are betrothed at a very early period of life, and it is this betrothment, in fact, which constitutes marriage. The contract is then valid and binding to all intents and purposes. It is complete and irrevocable imme-

* See Appendix Elements Hindu Law, page 22 *et passim*, and Bombay Reports, pages 11, 35, 363, 370, 379, and 389, vol. i., and pages 108, 323, 434, 473, 576, and 685, vol. ii.

† Digest, vol. iii., page 104.

‡ Ibid, ii., page 400.

diately on the performance of certain ceremonies,* without consummation. Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu law;† though in practice, among the inferior castes, nothing is so common. Polygamy is also legally prohibited to men, unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, or the like. This precept, however, is not much adhered to in practice. The text of *Menu*, which in fact prohibits polygamy, has been held, according to modern practice, to justify it. "For the first marriage of the twice-born classes," says *Menu*, "a woman of the same class is recommended; but for such as are impelled by inclination to marry again, women in the direct order of the classes are to be preferred."‡ From this text it is argued by the moderns, that, as marriage with any woman of a different class is prohibited in the present age, it necessarily follows that a plurality of wives of the same class is admissible; but the inference appears by no means clear, and the practice is admitted by the *pundits* to be reprehensible; though nothing is more common, especially among the *Kooleen*, or highest caste of Brahmins.

In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *stridhun*, or make it up to her, if she have; but he is not required, in any case, to assign more than a third of his property. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient

* Ibid, page 484; and for an account of ceremonies observed at a marriage, see As. Res., vol. vii., page 288; also Ward on the Hindus, vol. i., page 130 *et seq.*

† But a widow who, from a wish to bear children, slights her deceased husband *by marrying again*, brings disgrace on herself here below, and shall be excluded from the seat of her lord. *Menu*, cited in Dig., page 463, vol. ii.

‡ *Menu*, chap. iii., § 12.

maintenance. In the *Mitácshará*, a distinction is made. Where a second wife is married, there being a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage; but, where no objection whatever exists to the first wife, a third of the husband's property should be given as a compensation.* But in modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.

There are eight forms of marriage: *The Brahma, Daiva, Arsha, Prajapatya, Asura, Gandharva, Rácshasa,* and *Paisacha.*

The four first forms are peculiar to the *Brahminical* tribe. The principle in these contracts seems to be, that the parties are mutually consenting, and actuated by disinterested motives.

The fifth form is peculiar to *Vaishyas* and *Sudras.* It is reprobated, on the principle of its being a mercenary contract, consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud and circumvention.†

The most usual form of marriage is that of the *Brahma,* which is completed "when the damsel is given by her father, when he has decked her, as elegantly as he can, to the bridegroom whom he has invited," the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of the *Asura,* where a pecuniary consideration is received by the father;

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* *Yájnyawalcya,* cited in Dig., vol. ii., page 420; and see a case to this effect stated, Elem. Hin. Law, App., p. 51.

† Digest, vol. iii., page 606.

and I am given to understand that marriages by the *Paisacha* mode are not uncommon; and that young women, who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony; the forms of which once gone through, the contract is not dissoluble on any plea of fraud, or even of force.*

The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no forms are necessary;† and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, "reciprocal amorous agreement," would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man.‡

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu:* "She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his father or *mother*, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, but not a civil offence, and an action for damages preferred by the husband will not lie against

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* This is not the only instance in which fraud is legalized by the Hindu law. That law sets aside gifts or promises made for the purpose of delusion, though this is fraud on the side of the person who practises the imposition, and can entitle him to no relief. The same law allows to the creditor a lien upon a deposit or commodate in his hands for the recovery of his due from the debtor who so entrusts any article to him; and even permits the practice of trick and artifice to obtain possession of such an article with the purpose of retaining it as a pledge.—Colebrooke, Obl. and Con., Book ii., § 95, and Book iv., § 518.

† This form of marriage is declared to be peculiar to the military tribe. May not the indulgence have originated in principles similar to those by which, according both to the civil and English law, soldiers are permitted to make nuncupative wills, and to dispose of their property without those forms which the law requires in other cases?—Bl. Comm., vol. i., page 417.

‡ On this principle the law-officers of the Sudder Dewanny Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in a case where the parties had cohabited for some time, and the man signified his intention by placing a garland of flowers round the neck of the woman. See also Elem. Hin. Law, App., p. 198.

the adulterer.* It is not a sufficient cause for the wife to desert the husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence.† A married woman has no power to contract, and any contract entered into by her will neither be binding on herself nor on her husband, unless the subject of the contract be her own peculiar property, or unless she have been entrusted with the management of her husband's affairs, or unless the contract may have been requisite to her obtaining the necessaries of life.‡

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* Colebrooke, cited Elem. Hin. Law, App., p. 33. So also our Regulations, following the Moohummudan law in this particular, treat the offence as a crime against society, and not against the individual, but they require that the husband shall stand forward to prosecute. There is a case cited by the author of the Elem. Hin. Law (App., p. 34), in which the *pundits* ruled that the adulterer was liable for the money expended by the injured husband in contracting a second marriage; but this was considered to be rather an equitable opinion than founded on any express text of law. [See 8, Legal Companion, p. 47, the case of Lingee *v.* Gujjaiya, in which it was *held* that a Hindu husband can recover damages from the person who commits adultery with his wife.]

† *Menu*, cited in Dig., vol. ii., page 412.

‡ Colebrooke, Obl. and Con., Part I., Book ii., §§ 57 and 58.

CHAPTER VI.

OF ADOPTION.

The etymology of the Sanscrit word for a son (*putra*) clearly evinces the necessity by which every Hindu considers himself bound to perpetuate his name. "Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself."* Again: "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."† Under this feeling, it was natural to resort to the expedient of adoption. Twelve sorts of sons have accordingly been enumerated by *Menu*. "The son begotten by a man himself *in lawful wedlock*; the son of his wife, begotten in the manner before described; a son given *to him*; *a son made or adopted*; a son of concealed birth, *or whose real father cannot be known*; and a son rejected by his natural parents; are the six kinsmen and heirs. The son of a young woman *unmarried*, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to *collaterals*."‡

In treating of the miscellaneous customs of Greece, the author of the Antiquities§ observes as follows:—"Adopted children were called *Paidesthetan or Eispoietoi*, and were invested in all the privileges and rights of, and obliged to

* Institutes of *Menu*, chap. ix., § 138.
† *Smriti*, quoted in the *Retnácara*: or, in the language of Statius, "*Orbitas omni fugienda nisu. Orbitas nullo tumulata fletu.*"
‡ Institutes of *Menu*, chap. ix., §§ 159 and 160.
§ Vol. ii., p. 336.

perform all the duties belonging to, such as were begotten by their fathers; and, being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they have left, unless they first renounced their adoption, which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who had adopted them, thus providing against the ruin of families, which would have been extinguished by the ruin of those who were adopted to preserve them. If the adopted person died without children, the inheritance could not be aliened from the family into which they were adopted, but returned to the relations of the persons who had adopted them. The Athenians are by some thought to have forbidden any man to marry after he had adopted a son, without leave from the magistrate; and there is an instance in Tyszet's Chiliads of one Leogoras, who, being ill-used by Andocides, the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopted sons; and if they begot legitimate children, their estates were equally shared between those begotten and adopted."

The whole, or nearly the whole, of the provisions above cited, are strictly applicable to the system of adoption as it prevails among the Hindus at this day. But the renunciation of adoption is a thing unheard of in these provinces, and unsanctioned by law under any circumstances. There is no express text declaring illegal a renunciation of adoption, but at the same time there is not any which can be construed as approaching to a justification of it.

What forms at present allowed.

In the present age, two, or at the most three, forms of adoption only are allowed, in these provinces; and the *Dattaca*, or son given, and the *Critrima*, or son made, are the most common. The latter form obtains only in the province of Mithilá. In strictness, perhaps, adoption in this form should

be held to be abrogated, as the filiation of any but a son legally begotten, or given in adoption, is declared obsolete in the present age;* but agreeably to a text of *Vrihaspati*, immemorial usage legalizes any practice.† Some of the requisite conditions for the adoption of a son are comprised in the following texts of *Menu*:—"He whom his father or mother,‡ with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, *the gift being confirmed* by *pouring* water." "He is considered as a son made or *adopted* whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."§ But there are many conditions besides these fundamental ones: and briefly noticing such of the rules as are indisputable, and universally admitted, I shall discuss those which have admitted of doubt, and endeavour to fix such as are uncertain, by citing the authorities in support of each. Regarding this particular branch of the law, there is not much difference in the doctrine of the several schools; the *Dattaca-chandricá* and *Dattacamimánsá*, the two chief authorities on the subject, being respected by all. The first text above cited is sufficiently explicit as to the persons who possess the right of giving in adoption; and the only exception that has been propounded by the commentators is contained in the *Dattacamimánsá*, which refers to the gift of her son by a widow during a season of calamity; and it has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son; but her com-

Dattaca form of adoption,

and *Critrima* form.

A widow, if in distress, may give her son in adoption.

* See general note by Sir W. Jones, appended to his translation of *Menu's* Institutes; and the text of the *Aditya Purána*, cited in *Jagannáth's* Digest, vol. iii., page 272.

† Cited in the Digest, vol. ii., page 128.

‡ Section 4, § 12.

§ Institutes of *Menu*, chap. ix., §§ 168 and 169.

And may adopt, with sanction of her late husband.

petency so to do is established by the prevailing authorities. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the adoption is invalid.* It is required that the party adopting† should be destitute of a son, and son's son, and son's grandson;‡ that the party adopted should neither be the only nor the eldest son,§ nor an elder relation, such

Qualifications of the adopting,

and of the adopted party.

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* Case of Taramunee Dibia *v.* Deo Narayun Rai and another, Sudder Dewanny Adawlut Reports, vol. iii., page 387. The same principle was recognized in the case of Raja Shumshere Mull *v.* Ranee Dilraj Koonwur, vol. ii., page 169.

† It has been doubted by Mr. Sutherland, in his Synopsis, whether an unmarried person, that is, one not a *grihi*, or, as we would say, bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212). In the Precedents, vol. ii., of this work, in the case of adoption No. 1, the *pundits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect to an adoption by a blind, impotent, or lame person.

‡ *Sounaka* cited in *Datt. Mim.* It has also been doubted by the author of the Considerations (p. 150), whether a man having a grandson by a daughter can adopt a son; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson" in the English translations, as applicable to the daughter's son as well as to the son's son. Mr. Sutherland, in his Synopsis, page 212, infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place. In the Summary of Hindu Law, p. 48, it is laid down as a rule, that the insanity of a begotten son would not justify adoption by the parent; but to this and other general positions laid down in that work I cannot altogether accede: for instance, it is stated, that the *Poonah Shastrees* do not recognize the necessity that adoption should precede marriage; that a younger brother may be adopted by an elder one; that the youngest son of a family cannot be adopted, &c., &c., for none of which can I find authority; though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

§ *Vasishtha, Dutt. Nir.*, and *Menu*, ibid; but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of Huebut Rao *v.* Govind Rao, vol. ii., page 75; also Elem. Hin. Law, App., pp. 82, 83.

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as the paternal or the maternal uncle;* that he should be of the same tribe as the adopting party;† that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Sudras*.‡ It is a rule also, that when a woman adopts, she should have the consent of her husband, or, according to the law laid down in some authorities, the sanction of his kindred;§ that where there is a brother's son, he should be selected for adoption in preference to all other individuals; but this is not universally indispensable, so as to invalidate the adoption of a stranger.‖ *Dattachandricá*, section 1, § 22. In the case of Ooman Dutt, pauper, appellant, *v.* Kunhia Singh, it was held, that while a brother's son exists, the adoption of any other individual is illegal; and this is undoubtedly consonant to the doctrine contained in the *Dattacamimánsá*, but it is controverted in the *Dattacachandricá*. It would appear, however, that, according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and the places where the *Mimánsa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually

Exception in case of *Sudras*.

Widow may adopt, with sanction of kindred, according to some authorities.

A brother's son should be preferred.

But this rule does not invalidate the adoption of a stranger.

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* *Dutt. Mim.*, sec. 2, § 32. Sudder Dewanny Adawlut Reports, vol. iii., p. 232. *Mit.* on *Inh.*, chap. i., sec. 11, p. 12.

† *Menu*, chap. ix., § 168.

‡ *Narada*, cited in *Dutt. Nir.*

§ According to the *Vyavahárakoustabha* and *Mayúc'ha*, authorities of the highest repute among the *Mahrattas*, which in this respect follow the doctrine of the *Dattacachandricá*, the sanction of the husband is not requisite; but in this respect the authorities above cited differ from most others. Bom. Rep., vol. i., p. 181, and vol. ii., pp. 76 and 456. See also Elem. Hin. Law, App., pp. 66, 68, 71.

‖ Sudder Dewanny Adawlut Reports, vol. iii., p. 144.

made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion.* It may be held, then, that the injunction to adopt one's own *Sapinda* (a brother's son is the first), and, failing them, to adopt out of one's own *Gotra*, is not essential, so as to invalidate the adoption in the event of departure from the rule. It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party, with the prescribed form and solemnities.† The adoption being once completed, the son adopted loses all claim to the property of his natural‡ family, but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted having succeeded to the property of his adopting father, and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property.§ He becomes (with the exception above noticed), to all intents and purposes, a member of the family of his adopting father, and he succeeds to his

Must be initiated in the adopter's family.

Effect of adoption.

His consanguineous relatives are not his heirs.

* Colebrooke, cited in Elem. Hin. Law, App., pp. 74 and 80.

† For an enumeration of the ceremonies enjoined at an adoption, see Summary Hindu Law, p. 52, and Elements Hindu Law, p. 82 *et seq.;* but the exact observance of these ceremonies is not indispensable.—Dig., vol. iii., page 224, and Elem. Hin. Law, App., pp. 101, 106.

‡ It has been asserted by the author of the Elements of Hindu Law, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred from the text of *Parijata*, "Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even, as was the case of Singa and Saisira," that adopted sons not bearing the double relationship might do so; but the inference is clearly untenable. Indeed, Mr. Sutherland, to whom he refers as his authority, expressly declares in his Synopsis (p. 219) that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures.

§ Elem. Hin. Law, App., p. 104.

property, collaterally as well as lineally;* but excepting the case of the peculiar adoption termed *Dwyamushayana*, he is excluded from participating in his natural father's property.† Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools.‡ If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.§

Exception in the case of a *Dwyamushayana*.

His share with a son subsequently born,

and with two or more.

A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity:|| and in the case of a Hindu of Bengal, dying in his father's lifetime without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such

Has all the rights of a posthumous son.

Example.

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* *Menu*, chap. ix., § 159.

† See Precedents of Adoption, case 10, and of Sister's sons, &c., case 7, *Vasishtha*, cited in the *Datt. Mim.* and *Catyáyana* in the *Dattacachandricá*.

‡ See the case of Srinath Serma *v.* Radhakaunt, and Dutt Narain Sing and others *v.* Roghoobeer Singh, S. D. A. Reports, vol. i., pp. 15 and 20.

§ It is laid down in the *Dattacachandricá*, that in case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son; and this rule prevails accordingly in the southern provinces.

|| Case of Ranee Kishermunee *v.* Oodwunt Singh and another, S. D. A. Reports, vol. iii., p. 220.

subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.*

Dwyamushayana form of adoption.

The above rules relate to a son adopted in the *Dattaca* form. But there is a peculiar species of adoption termed *Dwyamushayana*, where the adopted son still continues a member of his own family, and partakes of the estate both of his natural and his adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.† It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayana;* or ortherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayana;* and in this latter case, the connexion between the adopting and the adopted parties endures only during the lifetime of the adopted. His children revert to their natural family.‡ With a legitimate son subsequently born, the *Dwyamushayana* takes half a share of his adopting father's property.§

Of the *Nitya* form and *Anitya*.

His share with a son subsequently born.

Age of adoption.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be, that there is no defined and universally applicable rule as to the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure, according to one opinion, and of investiture, according to another, has not been performed in the family of the natural father.

According to the *Dattacamimánsá*.

In the *Dattacamimánsá*, the period fixed beyond which adoption cannot take place is the age of five years; and if the ceremony of tonsure have been performed within that

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* Case of Ramkissen Surkeyl *v.* Srimuttee Dibia, S. D. A. Reports, 367. See also Colebrooke in Elem. Hin. Law, App., p. 102.

† See the case of Raja Shumshere Mull *v.* Ranee Dilraj Koonwur, S. D. A. Reports, vol. ii., p. 169.

‡ *Datt. Mim.*, sec. 6, §§ 41 and 42.

§ *Datt. Chand.*, sec. 5, § 33.

period in the family of the natural father, the son adopted cannot become a *Dattaca* in the ordinary form, but must be considered an *Anitya Duyamushayana*, or son of two fathers. This can only be effected by the performance of the sacrifice termed *Putreshti*, by which the son is affiliated in both families.

And according to the *Dattacachandricá*.

In the *Dattacachandricá** the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *Oopunayuna*, and is subsequent to that of tonsure, or *Chooracurana;* and with respect to *Sudras*, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. The periods fixed, however, for the investiture of the three superior tribes are different. That of a Brahmin should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Cshetrya* at eleven years of age, and that of a *Vaisya* at twelve. But there are secondary periods allowed: for instance, the investiture of a Brahmin may be postponed until sixteen years after the date of conception; that of a *Cshetrya* until twenty-two years after the same date; and that of a *Vaisya* until twenty-four years. It should be observed, however, that where this ceremony of *Oopunayuna* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the

Periods of investiture for the different tribes.

* The difference of opinion with respect to this point arises from a difference of grammatical construction. The term in the original is *Chudadya* (signifying tonsure and the rest), which is a compound epithet termed *Buhobrihee*, which again is divided into two kinds called *tadguna* and *atadguna*, inclusive and exclusive. According to those who adopt the former construction, adoption is lawful even after tonsure; but not so according to those who adopt the latter. The former construction is adopted by *Devandabhutta;* the latter by *Nandapandita*.

authority of the *Dattacamimánsá*, be so far neutralized as to admit of its being re-performed after the ceremony of *Putreshti*.*

Period of adoption in Bengal and the southern provinces. And in Benares.

The authorities being entitled to equal weight in different parts of the country, the only ground of preference must be sought for in the different customs prevailing in different places. In the province of Bengal, and in the southern provinces, the more extended period should be assumed as the limit,† that being apparently consonant to the received practice; while in Benares, the *Dattacamimánsá*, which limits the period of adoption, should, for the same reason, be followed. In laying this down as a rule, it may be objected that there do not exist sufficient grounds for the establishment of its accuracy. It is proper, therefore, that the grounds of the rule should be stated. In the precedents which I have collected, there is no case bearing directly on the point. Case 2 (which is a Bengal case) does not expressly prohibit adoption after the age of five years. And in the case of Kerutnarain *versus* Musst. Bhobinesree (the only adjudicated one for Bengal that I can find bearing on the question)‡ the principle of the extended limit was fully discussed and admitted. The limitation to the age of five years is founded on a passage in the *Calicapurana*,§ and the authenticity of that passage is doubtful. The *Dattaca-*

Reason of the rule.

Precedents cited.

* This has been doubted by the translator of the *Dattacachandricá* and *Dattacamimánsá* in his Synopsis at the conclusion of that work, p. 225; and he diffidently expresses his inability to settle the question, though he inclines to the negative: but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture which causes the second birth has already been performed in the family of the natural father.

† For the doctrine as to the age of adoption according to the southern authorities, see Elem. Hin. Law, p. 75 *et seq.*, and Summary ditto, p. 50.

‡ S. D. A. Reports, vol. i., p. 161.

§ Dig, vol. iii., p. 228.

chandricá makes no mention of it, though the *Dattacamimánsá* does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Dekhan, where that principle is not only not recognized, but where it is denied, and adoptions continually take place at an age far exceeding five years. There is no standard work on the subject of adoption expressly for the Bengal school; but whenever there is any difference of opinion between the *Dattacamimánsá* and the *Dattacachandricá*, the doctrine of the latter conforms to that of Bengal; for instance, as to the share to be taken by an adopted with a legitimate son.* Other instances might be cited. If it should be considered that the reasons here given are insufficient to warrant the conclusion arrived at, it may at least be contended that it is open to a Bengal *pundit* to adopt either authority, and that the adoption of that which admits the more extended limit as being the more liberal construction could not be objected to. The author of the Considerations on Hindu Law as current in Bengal† seems adverse to the extension of the limit. He maintains that in the case of Gopeemohun Deb it was the opinion of all the *pundits* who were consulted on his behalf that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of Kerutnarain *v.* Musst. Bhobinesree, decided in the S. D. A.; but, with respect to the first, it may be observed, that there does not appear to have been any formal opinion actually taken; and, with respect to the second, it is not apparent from what authority the remark proceeded. The author of the Considerations lays it down as a second rule that adoption cannot take place in any of the classes after the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, that "investiture"

The doctrine of the *Mimánsá* preferred in Benares, and that of the *Chandricá* elsewhere.

Argument continued.

Adoption cannot take place after investi-

* *Dáyabhága*, 155.
† Page 144.

ture, but may after tonsure under five years.

should have been been substituted for the word "tonsure;" and that the doctrine should have been qualified by the provision that, if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *Anitya Dwyamushayana.* According to the *Mayúc'ha,* an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists; but when a relation, or *Sagotra,* is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family.* In Mithilá, where the *Critrima* † form of adoption prevails, there is no sort of restriction, except as to tribe; it being requisite that the tribe of the adopting father and of the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies;‡ so much so, that *Keshuba Misra* in the *Dwaita Purishishta,* treating of this description of adoption, has declared that a man may adopt his own brother,§ or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family,‖ and he takes the inheritance both of his own family and that of his adopting father.¶ Another peculiarity of this species of adoption is that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband;**

Among the Mahrattas, no restriction as to age of a relation.

Nor in the *Critrima* form.

According to which form a brother or a father may be adopted; and a *Critrima* does not lose relation to his natural family, but inherits in both.

Adopted by a widow, does not thereby become son of the husband,

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* Bombay Reports, vol. i., p. 195.

† This form of adoption is wholly unknown in Bengal; but see note, Sutherland's Synop., p. 221, and case of Ooman Dut *v.* Kunhai Singh, S. D. A. Reports, vol. iii., p. 144.

‡ See the case of Kullean Singh *v.* Kirpa and another, S. D. A. Reports, vol. i., p. 9.

§ The reverse of this opinion was maintained in the case of Baboo Runjeet Singh *v.* Obhye Narain Singh, S. D. A. Reports, vol. ii., p. 245; but the authorities cited by the law-officers in support of the doctrine laid down by them on that occasion had relation to the *Dattaca* form of adoption.

‖ Dig., vol. iii., p. 276.

¶ S. D. A. Reports, vol. iii., p. 307.

** Ibid, vol. ii., p. 27.

and the express consent of the person nominated for the adoption must be obtained during the lifetime of the adopting party.* This relation of *Critrima* son extends, as has been already observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father. He does not inherit collaterally, being ninth in the enumeration, according to *Yájnyawalcya.*†

and must himself consent to the adoption. The relation does not descend.

Does not inherit collaterally.

It has already been observed that a man who has a son, son's son, or son's grandson, is not competent to adopt a son; and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former‡ away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattaca-mimánsá*, there is a prohibition against the gift of a son, where there are only two; but the precept is merely dissuasive, and not peremptory.

A man having a son, and a son's son, may give the former in adoption.

Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous.§ The supposition seems to have proceeded on a misconstruction of the following text of *Menu*:—"If, among several brothers of the whole blood, one have a son born, *Menu* pronounces them all fathers of a male child by means of that son."‖ But that text is not meant to authorize the adoption of a nephew even, by two or more brothers. The adopted son of one brother would, of course, offer up oblations to the

Two persons cannot adopt the same individual under any circumstances.

* S. D. A. Reports, vol. ii., p. 173.
† Dig., vol. iii., p. 276.
‡ In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.
§ See Considerations on Hindu Law, p. 473 *et seq.*
‖ Cited in Dig., vol. iii., p. 266.

ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir.

Another point which has been the subject of much discussion is, as to whether an adopted son by the *Dattaca* form succeeds collaterally, as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative.

A *Dattaca* son succeeds collaterally, but not to the property of cognates.

It is true that *Jimutavuhana*, in the *Dáyabhága*, has contended that the son adopted in the *Dattaca* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of *Menu*, cannot be held entitled to any weight.* It should be observed, however, that a son so adopted has no legal claim to the property of a *Bandhu* or cognate relation; for instance, if a woman, on whom her father's estate had devolved, adopt a son with the permission of her husband, the son so adopted will not be entitled to such estate on his adopting mother's death. It will go to her father's brother's son, in default of nearer heirs. This point was determined in a case recently decided by the Court of Sudder Dewanny Adawlut.† It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, inasmuch as the maternal grandfather is enumerated among the kindred by all the Hindu legislators; but the reason is, that the party adopted in the latter case becomes the son of a person whose lineage is distinct from that of the maternal grandfather.

Example.

Reason for his not succeeding to cognate's property.

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* This question has been amply discussed in the Considerations on Hindu Law, p. 128 *et seq.* See also case of Shamchunder and Rooderchunder *v.* Narayinee Dibia and Ramkishen Rai, S. D. A. Reports, vol. i., p. 209.

† See the case of Gunga Mya *v.* Kishen Kishore and others, S. D. A. Reports, vol. iii., p. 128.

The difference of opinion existing as to whether a *Dattaca* should be considered as heir of the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons; some legislators maintaining that *Menu* included in the *Dattaca* among the first six, who are entitled to inherit collaterally, while others maintain that the same law-giver ranked him among the last six, who can only inherit lineally. In the *Dwaita Nirnaya* the several opinions have been noticed, and the author of that work gives his own in favour of the *Dattaca*. In Sir William Jones's translation of the Institutes of *Menu*, the *Dattaca* is ranked among the first six; and a great majority of the *pundits* throughout the country, who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion that the *Dattaca* is entitled to inherit collaterally.* The author of the *Dattacachandricá*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise.†

Reason of the difference of opinion as to the *Dattaca's* right of collateral succession.

Authorities cited.

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* This question was circulated by the Court of Sudder Dewanny Adawlut to all the Courts under its jurisdiction to ascertain the law on the point from their Hindu law-officers. See p. 161, Considerations on Hindu Law.

† I may here be permitted to introduce the following report of a case decided on the 30th April 1821, tending to establish this point, and as generally connected with the law of adoption. The report was not given with other decisions of the Sudder Dewanny Adawlut of the same year; and from the importance of the case, it may be concluded that the omission was attributable to oversight.

The appellant in this case was Gourhurree Kubraj, guardian of Sheopershad Chowdree, a minor, against Musst. Rutnasuree Dibia, mother of Kuroona Kant Rai, also a minor.

The suit was originally instituted by the appellant against Kashee Kant Rai, in the Moorshedabad Provincial Court, on the 14th of March 1814, to recover possession of a three-anna share of the *zemindaree*, Pergunnah Tahirpoor, and the independent Kismuts Talgachee, Juggunnathpoor, &c., &c., in *zillah* Rajshahye. The action was laid at Rs. 7,051, the estimated annual produce.

The plaint set forth that Rajah Mohindernarain had five sons, viz., Ramindernarain, Rubindernarain, Jadubindernarain, Munneindernarain,

It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another. It is written in the

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and Oopindernarain, of whom Jadubindernarain and the two others last mentioned died without children. On the death of Mohindernarain, one moiety of the six-anna share in Pergunnah Tahirpoor, which constituted his *zemindaree*, descended to Anundindernarain, the adopted son of Ramindernarain and father of Sheopershad, a minor, and the other half to Bhyrubindernarain, as heir to his adopting father Roghooindernarain, son of Rubindernarain. Anundindernarain Chowdree sold a five-pie share of his three-anna portion, and retained possession of the remaining portion. Bhyrubindernarain died in 1204, B.S., leaving Jugdusuree his wife, and Bunmalee Dibia his daughter. Jugdusuree obtained possession, and was registered as proprietor of her husband's share; and in the year 1212, B.S., gave Bummalee, when she was nine years old, in marriage to the defendant. Bunmalee died on the 27th of Phagoon 1213, B.S., before she arrived at years of maturity; and Jugdusuree likewise died on the 17th of Cheyt in the same year. As Sheopershad was entitled to perform the *sraddha* and to succeed to the property left by Jugdusuree, he presented a petition to the collector to be registered as proprietor of the deceased's estate, which was opposed by the defendant, on the plea that Jugdusuree had made a gift in 1207, B.S., of the *zemindaree* and her other property to him and to his wife Bunmalee, to which he was therefore entitled: his claim was also opposed by Eshurchund, a person who represented himself to be the adopted son of the deceased, and who likewise applied for the entry of his own name. The collector rejected Sheopershad's application, and ordered the defendant's name to be entered for Jugdusuree's *zemindaree*, according to the conditional deed of gift produced by him, though contrary to the *Shasters*, and referred Sheopershad and Eshurchund to a civil suit. Eshurchund brought an action in the *zillah* court through his guardian Gungaram Bhaduree, and obtained a decree, which was reversed on appeal by the provincial court, and his claim as adopted son rejected. This decision was subsequently affirmed by the Sudder Dewanny Adawlut, which court passed an order, on the 4th of February 1813, directing Sheopershad to prefer his claim, as heir, either in the *zillah* or provincial court, to the estate left by Jugdusuree, when it would be decided whether the deed of gift produced by Kashee Kant Rai was valid or not, according to the *Shasters*. Bunmalee Dibia was married to Kashee Kant in the year 1212, B.S.; and the deed of gift produced by the defendant as having been executed by Jugdusuree in favour of himself (Kashee Kant) and his wife Bunmalee is dated the 23rd of Assar 1207, B.S. Jugdusuree was in possession of the estate during her lifetime, namely, till Cheyt 1213, B.S., during which period Kashee Kant Rai (who was not competent to perform the exequial rites) had nothing to do with it, and no mention was made of the deed of gift. From the condition specified in the said deed, it appeared that the gift was made to Kashee Kant and Bunmalee Dibia, in the event of the latter becoming pregnant. It was very suspicious, and altogether unlikely, that the idea of Bunmalee's pregnancy should have been entertained five years previous to her marriage, and inserted in the deed of gift. The instrument by which Jugdusuree bequeathed her property on her death to the defendant and Musst. Bunmalee is invalid, inasmuch as she is not empowered by the *Shasters* to alienate it by sale or gift, and as, moreover, Bunmalee died during the

Dattacamimánsá: "A man destitute of a son (*aputra*) is one to whom no son has been born, or whose son has died; for

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lifetime of Jugdusuree, her succession was thereby defeated. Besides, by a compromise entered into formerly between Anundindernarain, the father of Sheopershad, and Bhyrubindernarain, the husband of Jugdusuree, it was provided that the estate and property of either of them who should die without children should go to the survivor and his heirs; so that, in every point of view, Sheopershad was entitled to Jugdusuree's property.

The defendant in answer stated that, after three of the five sons of Rajah Mohindernarain had died without children, Rubindernarain, grandfather of Bhyrubindernarain, the husband of Ranee Jugdusuree, and Ramindernarain, grandfather (as alleged by the plaintiff) of Sheopershad, became possessed of the six-anna share of *pergunna* Tahirhoor. A moiety, or three-anna share, devolved at the death of Rubindernarain on Raghoo-indernarain by the law of inheritance, and on his death it went to Bhyrubindernarain, and on his dying without sons to his widow Musst. Jugdusuree. The remaining three-anna share descended to Anundindernarain, by a gift from Ranee Lukhee, widow of Ramindernarain, and a deed of compromise, alleged to have been executed by Bhyrubindernarain. The property did not go to Anundindernarain by right of adoption; for Ranee Lukhee, after her husband's death, had, in conformity to his permission, adopted, in the first instance, a person named Roodurnarain, and on his death Anundindernarain, without the permission of her husband, and in opposition to the *Shasters*, on which account she had made a gift to him of her estate. An adoption of this nature has never been recognized by the *Shasters*, by the usages of the Brahmins or other Hindu tribes. A suit was, in consequence, instituted in the *zillah* court between Bhyrubindernarain and Anundindernarain, and regularly carried in appeal before the Sudder Dewanny Adawlut. The *vyavasthá* submitted by the pundit of the *zillah* court, which likewise coincided with five legal opinions filed by Bhyrubindernarain, invalidated the adoption. The *zillah* judge, however, acted on the opinion expressed by other pundits which were submitted by Anundindernarain, and passed a decree in his favour, declaring in that decree, which was dated June the 30th, 1795, that the object of Ranee Lukhee, in executing a deed of gift of that nature, was to secure to Anundindernarain in some way, either by adoption or by gift, the succession to her property, and that, in the event of any dispute arising after her death on the subject of the second adoption, there might be no doubt of her property descending to Anundindernarain under the deed of gift. By the decision of the superior court, the adoption of Anundindernarain was declared illegal, and he was allowed to succeed to the property solely on the ground of the deed of gift and the compromise, the authenticity of which was not ascertained. Besides, even supposing the adoption to have been valid, the person adopted is only entitled to the property of his adopting father, and has no claim to the property of his adopting father's family or collateral relations. Sheopershad, therefore, could have no title whatever to the three-anna share of the estate in dispute. The following, he affirmed, was the true state of the case. It is the usage among Brahmins for a *Kooleen*, when he marries into an inferior family, to receive a large valuable consideration. Accordingly, in 1207, B.S., Ranee Jugdusuree, wife of Bhyrub-

a *text of Sounaka* expresses, "one to whom no son has been born, or whose son has died, having fasted for a son, &c.;"*

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indernarain, who was of an inferior family, having agreed to give her daughter Bunmalee Dibia in marriage to him (the defendant), who was of the *Kooleen* caste, made a gift of her *zemindaree* and other property to his wife Bunmalee Dibia and himself, with the knowledge and consent of all her family, as well as of Anundindernarain. But, in consideration of their youth, she executed an *icrarnama* in the form of a will, in favour of his (the defendant's) father, Kalee Kant Rai, empowering him to superintend and take care of the estate during the period of their minority, and died in the year 1213, B.S. Anundindernarain also lived till 1212, B.S., subsequent to the execution and registry of the deed of gift: and, had he considered himself the heir of Ranee Jugdusuree, he would, undoubtedly, have opposed the proceeding, either at the time or at some subsequent period of his life. He, however, had never done so. On the death of Ranee Jugdusuree, Gungaram Bhaduree, the plaintiff's uncle, having persuaded Benood Ram Rai, proprietor of a ten-anna share in the above *pergunna*, to collude with them, forged an *ijazutnama*, or deed of permission to adopt, and a *hibbanama* and other documents, and sued him (the defendant), first stating that Eshurchunder was the adopted son of the Ranee: but their claim was rejected, and, therefore, the present suit (fraudulently preferred on the ground that Sheopershad was the heir, and entitled to the property alienated by the gift of the Ranee) was altogether inadmissible; inasmuch as the illegality of Anundindernarain's adoption invalidated the claim of Sheopershad to the property of Ranee Jugdusuree; and the Ranee having, before the birth of Sheopershad, made a gift of her property to him (the defendant) and to his wife, it could not be considered as her estate on her death. Besides, he had himself, with his own money, paid off a mortgage contracted on the estate since the time of Bhyrubindernarain, when it would otherwise have been sold. The forgery of the deed of compromise produced by the plaintiff was evident, from the circumstance of its being dated on the 11th of Bhadoon 1212, B.S. The suit about the adoption of Anundindernarain, pending between him and Bhyrubindernarain, his (the defendant's) father-in-law, was decided in the Rajshahye *zillah* court on the 13th of Assarh in the above year, afterwards in the provincial court, and lastly in the Sudder Dewanny Adawlut on the 4th of Assin 1208, B.S. Had the deed of compromise been genuine, and in the possession of

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* Page 2.—There is a *vyavasthá* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to *Menu*, though not to be found in the Institutes: "Many sons are to be desired, that some one of them may travel to Gya." But this text obviously relates to legitimate sons. See the case of Goureepershad Rai *v.* Musst. Jymala, p. 136, vol. i., S. D. A. Reports. And Mr. Colebrooke observes, in a note to p. 42, ibid, that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that *Jagannátha*, in his Digest, inclines to hold it valid; but that the author of the *Dattacamimánsá*, a work of great authority, maintains the contrary opinion.

but it seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son

A man having a son or an adopted son,

Anundindernarain, he would undoubtedly have brought it forward in some court of justice. And as the cause between Anundindernarain and Bhyrubindernarain was pending till 1208, B.S., it was extremely improbable that a compromise should have been entered into in 1202, B.S. Anundindernarain also was a minor at that time, and many suits had been preferred in the civil and criminal court and in the collector's office relative to the estate between 1202 and 1213, B.S., a period of 12 years, during which Ranee Jugdusuree was alive; but no mention had ever been made of the compromise, nor had it ever been registered, or before produced.

On the death of the defendant, his wife, Musst. Rutnusuree Dibia, mother of Kuronah Kant Rai, his minor son, became his representative in the suit.

The plaintiff, in replication, maintained that Ramindernarain, grandfather of the minor Sheopershad, and his brother Rubindernarain, lived together as members of an undivided family. Rubindernarain died leaving a son, Raghoindernarain his heir; and Ramindernarain died leaving his widow, Musst. Lukhee Ishuree, to whom he granted permission to adopt a son. In Kartik 1170, B.S., Raghoindernarain died leaving a widow, Musst. Sirsuttee, who with Lukhee Ishuree, the grandmother of the minor Sheopershad, enjoyed joint possession of the estate. Musst. Sirsuttee adopted Bhyrubindernarain, entered his name jointly with that of Lukhee Ishuree in the collector's office, and died in 1162, B.S.; and the grandmother of Sheopershad died after having adopted Anundindernarain according to her husband's permission, put him in possession of the estate during her own lifetime, and by means of an application effected the registry of his name instead of her own. Bhyrubindernarain afterwards instituted an action, on the ground that the adoption of Anundindernarain was illegal. By the decisions, however, of the *zillah* and provincial courts and of the Sudder Dewanny Adawlut, the adoption of Anundindernarain was held to be valid, and a decree passed in his favour. There could, therefore, be no doubt of Sheopershad's title, and of his being the *Pindadhikar*, or person entitled to perform the exequial rites of Jugdusuree and Bhyrubindernarain. As Kalee Kant Rai, father of Kashee Kant, the defendant, was adopted by Kishen Kant Rai, and according to the *Shasters* the distinction of the *Kooleen* caste is lost on the adoption, and as the dignity of the ancestors of Mohindernarain (who were Rajahs) was superior, the allegations of the defendant relative to Jugdusuree having given her property to him on his marriage with her daughter, in consideration of his rank, were evidently false, inasmuch as, from the time of the ancestors of Mohindernarain, Ramindernarain, and Anundindernarain, connexions had subsisted between them and the *Kooleen* Brahmins. No one ever gave his whole estate to his daughter and son-in-law; but it is both the law and usage, that if a person dies without male issue, his estate will not devolve to his daughters, or daughters' sons, but only to the descendants from the same grandfather. In accordance with this custom, on the death of Indernarain Rai without male issue, his estate did not go to Ramsingh, his daughter's son, who was alive, but to the persons descended from the same grandfather as himself. The truth of all these representations

may authorize his wife to adopt another,

after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead;* and it

will be established on inquiry. If the father of Sheopershad had been aware of the gift alleged by the defendant, he would certainly have opposed it. It is singular that the deed of gift declares that the gift is made for the performance of exequial ceremonies, and stipulates that Ranee Jugdusuree shall, during her lifetime, retain possession of the above estate, and have the power of alienation by sale or gift. As, therefore, the Ranee enjoyed possession of the estate, and retained the power of disposing of it by gift or sale, and did, subsequently to the execution of the deed of gift, give, in the exercise of her proprietary right, *dewotter* and *bruhmoter* lands to many persons, and the donee did not obtain possession of the lands given to him, it did not clearly appear with what view the will in favour of the defendant's father was executed, or what law legalized a conditional gift of the above nature, or how, Bunmalee Dibia having died childless in the lifetime of her mother, the condition relative to the performances of exequial ceremonies could hold good.

The rejoinder of Rutnusuree Dibia set forth that as both the donor and the donee were dead, and the property given had descended as an hereditary estate, the claim of any person thereto was inadmissible according to the *Shasters*, and that her son, as the *Pindadhikar* of Bunmalee Dibia, was undoubtedly entitled to her property.

On the 13th of June 1817, the second judge of the provincial court dismissed the claim with costs, on the ground of the *vyavasthá* submitted by the *pundit* of the court, which declared that an adopted son was entitled to the property of his adopting father, not to that of his adopting father's collateral relations; that a woman had not the power to adopt a second person on the death of an individual whom she had previously adopted with her husband's permission; and that, therefore, Anundindernarain, and consequently Sheopershad, were not entitled to the property in dispute; and that the deed of gift executed by Jugdusuree in favour of Bunmalee Dibia and Kashee Kant, her daughter and son-in-law, was valid.

The appellant, being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut, laying his claim at Rs. 15,151, three times the *sudder jumma* of the lands in dispute.

Eshurchunder Rai, the person claiming to have been adopted by Ranee Jugdusuree, presented a petition to the following effect:—

"The suit instituted by Gungaram Bhaduree, your petitioner's guardian, against Kashee Kant, to effect the reversal of the acting Collector's order for the registry of Kashee Kant's name as proprietor of a three-anna share in *zemindarce* Pergunnah Tahirpoor, was decreed by the judge of *zillah* Rajshahye. This decision was, however, reversed in the provincial court, and the order of the provincial court was affirmed on the 4th

* Case of Shamchunder and Rooderchunder, p. 209, vol. i., S. D. A. Reports, where it was established that there may be two successive adoptions by the widows of the same man; and the case of Musst. Solukhua *v.* Ramdolal Pande and others, p. 324, vol. i.

has also been ruled that authority to a wife to adopt, in the event of a disagreement between her and a son of the

failing such son.

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of February 1813 by W. E. Rees, Esq., formerly acting judge of the Sudder Dewanny Adawlut. On your petitioner making frequent applications for redress to the former judges of this Court, he was informed by Mr. Harrington that when the cause of Sheopershad Chowdree came before the court, they would take into consideration your petitioner's case, and decide upon it. As your petitioner's adoption is established by the papers in the case of Sheopershad *v.* Kashee Kant (No. 1779), your petitioner hopes that when the above cause comes before you, you will take into consideration the present petition, and the papers filed on the former trial, as well as the petitions for a review, and the *vyavasthás* of the *pundits* of this court filed in the cause of Ranee Siromunee and others, and afford him redress."

The case having been brought to a hearing before the second judge (C. Smith), all the pleadings and exhibits of the parties were perused, as well as two petitions presented by Eshurchunder Surma, two *vyavasthás* of the *pundits* of this court, one in the case of Bijia Dibia, appellant, *v.* Unnapoorna Dibia, respondent, the other in the case of Shamchunder Chowdree and Rooder Chunder Chowdree, appellants, *v.* Narainee Dibia Chowdrain and Ramkishore Rai, respondents, and the interrogatories of this court to the *pundits* aforesaid; the papers of the Rajshahye *zillah* court, the provincial court, and the Sudder Dewanny Adawlut in cause (No. 846) of Gungaram Bhaduree, guardian of Eshurchunder Surma, appellant, *v.* Kashee Kant Rai, respondent, and the decrees passed by all those three courts therein. Copies of two *vyavasthás* of the *pundits* of this court filed by the appellant's *vakeel*, and the proceedings in three different suits, viz., Bijia Dibia, appellant, *v.* Unnapoorna Dibia, respondent; Sohun Lal Khan, appellant, *v.* Ranee Siromunee, respondent; and Eshurchunder Paul and others, appellants, *v.* Kishen Govind Sein, respondent.

The *vyavasthá* of the *pundits* in the case of Shamchunder and Rooderchunder, delivered on the 21st of August 1807, was to the following effect:—

Q. Subsequently to the death of Kishenkishore, his senior widow had adopted Nundkishore as a son, and, on the death of the son so adopted, the second widow of the said Kishenkishore adopted an individual called Ramkishore, who is still living: under these circumstances, Joogulkishore, a person adopted by Kishengopaul, the uterine brother of Kishenkishore, and his half-brother Luchmeenarain's two sons, Shamchunder and Rooderchunder, claim the property left by Nundkishore and Kishenkishore: Now, supposing the adoption of both the sons to have been proved, in this case, which of the claimants is or are entitled to inherit the property of Kishenkishore and Nundkishore? and does an adopted son succeed collaterally as well as lineally?

R. The property, whether consisting of moveables or immoveables, belonging to Kishenkishore, deceased, who left no issue of the body, will devolve on the son whom his younger widow had adopted according to the mode prescribed by law. The uterine son adopted by Kishenkishore's brother and his half-brother's sons have no right of succession. The property of the deceased Nundkishore, in default of issue of his adopt-

husband, then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.* It

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ing mother, will devolve on the adopted son of his step-mother whom she adopted with her husband's sanction, provided he be endued with the requisite qualities, and able to benefit his parents by performing the *(Nitya)* indispensable and fixed observances, *(Nimittika)* casual rites, *(Camya)* supererogatory works (which are performed at pleasure, or through the desire of some advantage), *(Eesta)* essential ceremonies, as ablution, investiture, &c., *(Poorta)* acts of pious liberality, as digging a well, planting a grove, building a temple, &c., and so forth, prescribed to his own tribe. In this case, the surviving adopted son (of the second widow) being a nearer *sapinda* to the deceased son adopted (by the eldest widow) than the other relations who claim, he will succeed exclusively to the property, and the kinsmen will have no claim. This opinion is consonant to the doctrine of *Menu*, *Goutama*, and *Boudháhyana*, the first of whom holds the first rank among legislators; and the doctrine is also consonant to the *Munwartha Mooktavuli*, *Dattacamimánsá*, *Vivádabhangárnava*, *Ratnácara*, and other authorities.

Authorities.—The text of *Devala* cited in the *Dáyatatwa* and other tracts: "All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten." The passage of *Yájnyawalcya* cited in the *Dáyatatwa* and other law-books: "The wife and the daughters, also both parents, brothers likewise."

"Of him who leaves no son, the father shall take the inheritance, or the brothers."—*Menu.* The text of *Vrihaspati* cited by *Raghunandana* and others:—"*Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Vedas:* no code is approved which contradicts the sense of any law promulgated by *Menu.*" The texts of *Menu* laid down in the *Ratnácara* and other tracts:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus;* among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanadocas*, and, as heirs, they succeed to the heritage of their collateral relations, on failure of male issue, as well as to the estate of their father." This is the explanation of *Cullúcabhatta.* The following texts are laid down in the *Ratnácara* and other tracts: *Goutama.*—"The son begotten by a man himself in *lawful wedlock*, the son of a wife *begotten by an appointed kinsman*, a son given, a son made by adoption, a son of concealed birth,

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* Case of Musst. Solukhna *v.* Randolal Pande and others, vol. i., p. 325.

is a disputed point, whether a widow having, with the sanction of her husband, adopted one son, and such son dying,

But whether she can without such sanction, is disputed.

and one rejected by his natural parents, are sons who inherit property. The son of an unmarried girl, the son of a pregnant bride, a son by a twice-married woman, the son of an appointed daughter, a son self-given, and a son bought, claim the family of their adopting fathers."

Boudháyana :—"Participation of wealth belongs to the son begotten by a man himself *in lawful wedlock*, the son of his appointed daughter, the son begotten on his wife *by a* kinsman *legally appointed*, a son given, a son made *by adoption*, a son of concealed birth, and a son rejected *by his natural parents*. Consanguinity, *denoted by a common family appellation*, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a priest by a *Sudra*." Although *Jimutavahana*, *Raghunandana*, and others, explaining the text of *Devala* cited in the *Dáyabhága*, have not reconciled the dispute in regard to the given son, and the rest being heirs to collaterals or otherwise, yet it should not be therefore supposed that the given son has no right of collateral succession. The difference of opinion may be reconciled by referring to the distinction of the adopted son being *(Sagoona)* endued with good qualities, or *(Nirgoona)* not so endued. This is the doctrine contained in the *Ratnácara* and other authorities: and it must be admitted that the given son and the rest who are endued with good qualities are entitled to succeed both to the adopting father and his kinsmen.

"It is also proper to affirm, as intended by that expression, that sons given and others, being virtuous, are entitled to the inheritance, and so forth, in preference to a son by a twice-married woman or the like, if he be destitute of good qualities; but if all be destitute of good qualities, he who is superior, as nearest allied by birth, shall take a full share of the paternal estate, and the rest shall have the portions allotted to them in the *Brahmapurana* and other works. The maintenance directed must consist in the receipt of such a share; else the *seeming* contradictions in the texts of *Menu* and others, and of *Yájnyavalcya* and the rest, could not be well reconciled. But some argue, from the concurrent import of the text of *Devala*, that the text of the *Brahmapurana* also relates to sons given and the rest, who are inferior in class to their adoptive fathers."—*Vivádabhangárnava*.

The *vyavasthá* in the case of Bijia Dibia against Unnapurna Dibia was to the following effect:—

Q. Tarnee Choudhrain having, at her husband's death, taken possession of his entire property, real and personal, selected for adoption a boy named Kalikant, with her late husband's sanction. It appears from the deposition of a witness, Bhowanishunker, adduced by Kalibhairub and the said Tarnee (who were defendants in this cause), that Kalikant died previously to the celebration of the ceremonies prescribed for adoption; but it appears from the statement of the plaintiff Bijia Dibia that the boy died subsequently to his adoption. A few years after his death, the said Tarnee assigned over all the property which she held in her possession to her junior daughter's son (Kalibhairub), while her senior daughter was living and had a daughter. Subsequently the senior

she is at liberty to adopt another without having received conditional permission to that effect from her husband. Ac-

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daughter was delivered of a son, who laid claim to a moiety of the property disposed of as above stated. Under these circumstances, was the said Tarnee, according to the law of Bengal, competent to give away all her husband's property to her daughter's son while she had another daughter living, and is the deed of gift in such case valid and binding? Supposing the adoption of Kalikant to have been actually made in this case, was she (the said Tarnee) competent, after the death of such adopted son, to dispose of her adopted son's property by deed of gift in favour of her daughter's son?

R. A widow, without sanction of her husband's representatives, is incompetent to make a gift of his property which had devolved on her by right of inheritance, and the deed of gift which she made cannot be considered as valid or binding. No adopting woman is allowed to dispose of her adopted son's property, which had devolved on her at his death, by a deed of gift in favour of one heir, while there is a possibility of the birth of another. This opinion is conformable to the *Dáyabhága*, *Dáyanirnaya*, *Dáyarahasya*, *Vyavasthárnava*, *Dáyatatwa*, and other authorities current in Bengal.

Authorities—"But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus *Catyáyana* says: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." "Abiding with her venerable protector," that is, with her father-in-law, or others of her husband's family, let her enjoy her husband's estate during her life, and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure.—The *Dáyabhága*. It is laid down in the *Dáyanirnaya* that "no widow is competent to make a gift, or mortgage, or sale of her husband's property, except for the sake of performing his exequial rites, or other necessary purpose; and she, residing with her husband's family, is entitled to consume only such portion of his estate as may suffice for her subsistence."

For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth.—The *Bharata*. By the word "waste" it is meant that a woman cannot make a gift, sale, or other alienation of her husband's property at her pleasure.—*Dáyarahasya*.

"The property of a person dying, leaving neither son, son's son, nor son's grandson, goes to his virtuous widow; but she cannot make any alienation, as sale or the like, of such property, excepting for the purpose of promoting her husband's spiritual benefit by giving a part of it, or for the purpose of saving her own life."—The *Vyavastharnava*.

The text of *Náreda* laid down in the *Dáyarahasya*:—"Every sort of contract made by a woman, not in a time of distress, is null and void, particularly the gift, mortgage, and sale of the house and field."

The word "wife" is employed as a term of general import, and implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance.—The *Dáyabhága*.

cording to the doctrine of the *Dattacamimánsá*, the act would clearly be illegal; but *Jagannátha* holds the second

Doctine of *Jagannátha*.

The following passage is cited in the *Dáyabhága* and *Dáyarahasya*:—"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

The second judge recorded his opinion on the 2d of January, 1821, in these terms:—

"I am of opinion that neither of the parties in the present case are entitled to the property left by Ranee Jugdusuree, inasmuch as it has been established that Eshurchunder Chowdree, the appellant in the cause (No. 846), is the rightful heir. The proofs in favour of such a conclusion are fully detailed in my proceeding of this date. If, in concurrence with me, the Court, after admitting a review of judgment in case No. 846, reverse the decisions of this Court, and of the provincial court, and affirm the decree of the Rajshahye *zillah* court, it will be necessary to affirm the decree passed by the Moorshedabad provincial court in this case. If, however, on the contrary, they uphold the decree passed by this Court on the 4th of February, 1813, I consider the title of Sheopershad Chowdree (the appellant) to be, according to the *Shasters*, undoubtedly superior to that of Kasheekant Rai, the respondent's father. For Kasheekant Rai only stood in the relation of a son-in-law, which ceased on his wife's dying without children during her mother's lifetime, and his claim under the conditional deed of gift is altogether inadmissible according to the law of inheritance; inasmuch as the condition was cancelled by the death of the person on whom the fulfilment was enjoined, and on failure of Ranee Jugdusuree's own and adopted children, Sheopershad Chowdree, the appellant, appears the only person who has any title to succeed as heir."

Under these circumstances, the second judge recorded his opinion, that the Court should either admit a review of judgment in Eshurchunder Chowdree's case, reversing the decrees of this and of the provincial court, and affirming the decree of the Rajshahye *zillah* court, dated July the 12th, 1808, and uphold the decision of the first judge of the Moorshedabad provincial court, dated June 13th, 1817, dismissing Sheopershad's claim, and making the costs of all courts payable by the parties respectively; or that they should reject the application for a review in case No. 846, and, affirming this Court's decree, dated the 4th of February 1813, should reverse the decision of the first judge of the Moorshedabad provincial court, and award to Sheopershad Chowdree a three-anna share of *zemindaree pergunnah* Tahirpoor, with mesne-profits for the period during which it had been in the possession of Kasheekant Rai, charging the costs of both courts to the respondent.

The case was next brought before the third and officiating judges (S. T. Goad and W. Dorin). Their proceeding of the 8th of February was to the following effect:—

"It appears that the appellant lays claim to a three-anna share in the *zemindaree* of *pergnnnah* Tahirpoor, which was in the possession of Ranee Jugdusuree, who died in 1213, B.S. The Ranee was seized of the three-anna portion in dispute on the death of her husband Bhyrubindernarain in the year 1204, B.S., who left no male issue and only one daughter.

Of Bengal. adoption in such case would be valid, the object of the first having been defeated. According to the authorities which

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The daughter also died at the age of nine or ten years, after her marriage with the late Kasheekant Rai, the respondent's husband. The appellant maintains that the share in dispute, being the estate left by Bhyrubindernarain, the husband of Jugdusuree, descends to his heir; and as he is the son of Anundindernarain, Bhyrubindernarain's uncle, who was adopted by Ranee Sirsuttee, and was likewise the second adopted son of Ranee Lukhee, he is entitled to it according to the law of inheritance. The respondent contends that Ranee Jugdusuree transferred the above estate to her daughter and the husband of that daughter by a deed of gift executed on the 23rd of Assarh 1207, B.S., under the expectation that her daughter would bear a son, and stipulating that she (the donor) should remain in possession of the lands during her lifetime, as she accordingly did for six or seven years, and she opposes the claim preferred on the grounds of hereditary right by the appellant.

1st. Because the adoption of Anundindernarain by Ranee Lukhee, the wife of Ramindernain, had not taken place according to the *Shasters*.

2d. Because, even if the adoption of Anundindernarain had been legal, the appellant's claim to succeed as heir to the estate of Bhyrubindernarain and Ranee Jugudsuree was inadmissible according to the *Shasters*, inasmuch as he could not claim relationship with the husband of Ranee Jugdusuree through the adoption of his father.

But with respect to the objections urged by the respondent to the legality of Anundindernarain's adoption by Ranee Lukhee, in conformity to the permission of her husband, it is only necessary to state that Anundindernarain died in 1212, B.S., till which time he was in possession of his adopting father's estate, and that it appears from a decree passed by this Court on the 28th of September 1801, in the case of Ranee Jugdusuree, appellant, *v.* Anundindernarain, a minor, respondent, that several objections, raised to the adoption of Anundindernarain, were overruled at the time by this Court, and the adoption declared to be valid. Bhyrubindernarain, moreover, the husband of the appellant, upon that occasion admitted the legality of the adoption. Adverting to the foregoing circumstances, the Court do not consider that the respondent is authorized, after so great a lapse of time, now to call in question the legality of Anundindernarain's adoption. And as it is evident, from several former *vyavasthás*, that the deed of gift executed by Ranee Jugdusuree for her husband's estate, to the possession of which she had succeeded on his dying without male issue, is perfectly invalid, it only remains to ascertain whether now the appellant is, according to the Hindu law, entitled to the estate in dispute as heir.

A copy of this proceeding was accordingly ordered to be laid before the *pundits* of the Court, together with the genealogical table furnished by the appellant, to enable them, after a due consideration of their contents, to submit, within a fortnight, a *vyavasthá* consonant to the Hindu law as current in Bengal, in reply to the following question:—

Q. If the deed of gift produced by the respondent be illegal, and at the death of Jugdusuree her husband's heirs had the right of succeeding her, in this case, is the appellant, according to the law of Bengal, entitled to the property in question by right of representation or otherwise?

are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he And Benares.

R. Although Bhyrubindernarain should have died leaving no issue but a daughter, and his property should have been enjoyed by his widow Jugdusuree during her life, and the deed of gift (produced by the respondent) of all her property in favour of her daughter and her husband be illegal, yet on her demise, her property, even though it be subject to the succession of her husband's heirs, will not devolve on the appellant; for he cannot claim it by right of representation, as he, being the son of Anundindernarain, the second adopted son of Lukhee Dibia, does not hold the rank of *Sapinda.* A person according to law may desire his wife to adopt his son, but neither by law nor custom can he direct her to adopt one, and after his death another. The second adoption by the widow must be considered as illegal, and the adopted son cannot thereby rank in the relation of a *Sapinda;* and it follows, *à fortiori,* that the appellant has no tie of relationship with the deceased, when his father is debarred from that right. It appears in the question that Bhyrubinderinarain acknowledged the adoption of Anundindernarain; and the Court, having rejected the objections expressed on the subject, admitted the adoption to be good and legal. The ruling authority is independent, and may act according to its pleasure; but according to law, the second adopted son can be entitled to inherit the property of the individual only by whom he is adopted, and cannot inherit the property of his adopting parent's *Sapindas.* This opinion is consonant to the *Dattacamimansá, Dattacachandricá, Vyavahâramátricá,* and other authorities, as current in Bengal.

Authorities.—The texts laid down in the above authorities: "By a man destitute of a son only, must a substitute for the same always be adopted: with some one recourse *(Yasmattasmat Prayetnatus)* for the sake of the funeral cake, water, and solemn rites." "The funeral cake:" "*Sradha,* or funeral repast." "Water:" that is, the presenting water in the two united palms, and so forth. "Solemn rites:" meaning rites in honor of the deceased, cremation and the like. There are the cause *(hetu).* The reason, occasioning the adoption, is the cause. This, from being used in the singular number, shows that these ceremonies collectively are the cause, and not individually; and consequently, the meaning is, that there is not a distinct affiliation, severally for each; but one adoption only, on account of the whole: for, on default of a son, the failure of the oblation of food and other rites is the consequence."—The *Dattacamimánsá.*

As, in their proceeding of the 8th of February 1821, the Court did not require the *pundits* to give an opinion as to the legality or illegality of the adoption of Anundindernarain, they were directed to refrain from all consideration of the merits of that question; and taking for granted that it was legal, and that Anundindernarain was the adopted son of Ranee Lukhee, wife of Ramindernarain, to submit, within three days, a specific answer to the question proposed in the proceeding of the above date. It was added, that the Court would again take into consideration what was stated in their former *vyavasthá* relative to the adoption of Anundindernarain, after their delivery of the second *vyavasthá.* On the 21st of March 1821, the required reply was submitted, and was to the following effect:—

And western provinces.

gave her permission to do so during his lifetime; and, according to the law of the western provinces, with the sanc-

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"Supposing the Court to determine that the adoption of Anundindernarain by Ranee Lukhee, the widow of Ramindernarain, was valid, yet, as it was a second adoption, he (Anundindernarain) could not be considered a *Sapinda* of Bhyrubindernarain, nor *à fortiori* could his son Sheopershad be considered a *Sapinda* of the said Bhyrubindernarain. Therefore, if, after the death of Ranee Jugdusuree, the widow of Bhyrubindernarain, the property which had devolved on her is to descend to her husband's heirs, Sheopershad cannot have any right of succession."

As it appeared that the *pundits* had still not given an explicit reply to the question propounded by the Court in their proceeding of the 8th of February, they were directed to give their opinion *de novo*, taking for granted that the adoption of Anundindernarain was valid and unobjectionable in every respect, and as if Anundindernarain were the sole adopted son of his adopting father; and the following was the purport of the third *vyavasthá*, submitted on the 3rd of April 1821: That if Anundindernarain was the sole adopted son of his adopting father, and there was otherwise no question as to the legality of his adoption, in such case he must be considered as a member of the *Gotra* of his adopting father, and legally entitled to the property of his adopting father's *Sapindas;* and in the event of there being no nearer *Sapinda* to Bhyrubindernarain than the appellant Sheopershad, in such case the said appellant must be considered entitled to the estate. The *pundits'* opinion proceeded in the following manner:—This opinion is conformable to *Menu*, although the Court directed that our *vyavasthá* should be delivered according to the law of Bengal; and of all the authorities, the *Dáyabhága* is there most prevalent: and, although it is the opinion of *Jimutavahana*, quoting the text of *Devala*, and adopting his order of enumeration, that the son affiliated in the *Dattaca* form is not an heir of collateral relations *(Sapindas, &c.)*, nevertheless, as many *vyavasthás* have been delivered in the Court establishing the adopted son's collateral succession according to the law promulgated by *Menu*, this opinion is delivered according to the same law.

Authorities.—Menu: "Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, *except to their* own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten *in the manner before mentioned*, a son given to him, a son made or *adopted*, a son of concealed birth, *or whose real father cannot be known*, and a son rejected *by his natural parents*, are the six kinsmen and heirs." Commentary on the text of *Menu* by *Cullucabhatta:* "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus;* among those twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas;* and, as heirs, they succeed to the heritage of their collateral relations, on failure of male issue." The text of *Menu* laid down in the *Dáyabhága*, *Dáyatatwa*, *Dáyacramasangraha*, and other authorities: "To the nearest kinsmen *(Sapinda)* the inheritance next belongs."

tion of the husband's kindred, after his death; these authorities contending, that although a woman cannot of herself

Reason of the doctrine.

On the receipt of the above *vyavasthá*, the Court observed that from this *vyavasthá* it appeared that, in consequence of the death of Ranee Jugdusuree, widow of Bhyrubindernarain, without male issue, in 1213, B.S., her husband's estate, which had been enjoyed by her during her lifetime, would descend to her husband's nearest heir; and, supposing Anundindernarain to have been the adopted son of Ramindernarain and Ranee Lukhee, and a member of the family, that Sheopershad, the original plaintiff in the present cause, would succeed hereditarily as a *Sapinda*. In concurrence, therefore, with the opinion expressed by the second judge, they passed a decree in favour of the appellant's claim, reversing the judgment of the Moorshedabad provincial court, and making the costs of both courts payable by the respondent. By the decree, possession of the three-anna share in dispute was awarded to the appellant, with mesne-profits from the date on which the suit was instituted till put in possession. The following observations were introduced into the final decree.

It must be remembered that the proceeding of this Court, under date the 8th of February last, declared the respondent disqualified to call in question on the present occasion the legality of the adoption of Anundindernarain, the appellant's father, inasmuch as the legality of that transaction had been admitted, and recognized by a decree passed by the Sudder Dewanny Adawlut on the 28th of September, 1801 (which corresponds with 1208, B.S., in the case of Ranee, Jugdusuree, appellant, *v.* Anundindernarain, respondent. It appears, moreover, that Anundindernarain was adopted in 1200, B.S., by Ranee Lukhee, and enjoyed possession of his adoptive father's estate till his own death in 1212, B.S., when he was succeeded by his son, who, as heir, continued in possession till the institution of the present suit in 1220, B.S. The same objection now urged to the adoption was preferred on the former trial, viz., that the adoption, by the wife of any *zemindar*, of a second son, after the death of a previously adopted individual, was invalid. Two of the soundest and most learned *pundits* of the day, however, viz., those of the Tirhoot and Nuddea *zillah* courts, who were called on to submit their opinions on the subject, pronounced, in concurrence with the *pundit* of the Rajshahye *zillah* court, the adoption to have been a legal transaction; and as the former judges of this Court in 1801, by their decree, admitted and decided on the legality of Anundindernarain's adoption in the face of the alleged objection, the Court was of opinion that the above-mentioned decree, and the long lapse of time, does not leave the question of law open to their investigation. From the former decree of this Court, the grounds on which the judgment pronounced on that occasion was formed cannot be ascertained. But it is doubtful whether the former Court considered the adoption of Anundindernarain as a second adoption effected by Ranee Lukhee without permission from her husband, and legalized it proceeding on the *ijazutnama* obtained by her from her husband, although it specified no permission for adopting a second person, or construing the tenor of the *ijazutnama* to imply a tacit consent to the adoption of a second, on the death of the first son, which frustrated and nullified the object of the adoption, or whether they considered that the ceremonies of adoption had not been completely ful-

perform the ceremonies requisite to adoption, yet that there is no objection to her calling in the assistance of learned Brahmins, as is practised by *Sudras* on similar occasions. But according to the doctrine of *Vachespati*, whose authority is recognized in Mithilá, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *Dattaca* form; and to this prohibitory rule may be traced the origin of the practice of adopting in the *Critrima* form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, party. It is natural for every man to expect an

Doctrine of the Mithilá school.

Of the *Critrima* form.

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filled in the case of the first son; for he died a few months afterwards, and, according to the testimony of several witnesses, before he had gone through the ceremonies of investiture. Yet although these circumstances have not been detailed, it is evident that by that decree the adoption of Anundindernarain, which, it must be observed, is nowhere described therein as a second *adoption*, was declared legal after a due consideration of all the objections urged, and he was pronounced a member of the family. The question of law, therefore, is quite irrelevant to the present case. The *Shasters* were merely consulted to ascertain whether the appellant Sheopershad, being descended from the same paternal grandfather, was entitled by the law of inheritance to the estate in dispute; and the Court, in deciding that he is so entitled, have been guided by the above legal opinions and the *vyavasthá* submitted by the *pundits* in the case of Shamchunder and others, appellants, *v.* Narainee Dibia, respondent. There are certain other points which the Court consider it advisable to notice here.

1st. The authorities recited in the first *vyavasthá* submitted in this cause do not affect the adoption of two sons by one wife of a deceased person, or even a second adoption generally; nor is such an allegation supported by the tenor of former *vyavasthás*, furnished by the *pundits*, in the cases of Shamchunder and others, appellants, *v.* Narainee Dibia respondent; and Goureepershad Chowdree, appellant, *v.* Mussummaut Jymala, respondent.

2dly. The respondent's *vakeel*, after the *vyavasthá* was submitted, and while the cause was still pending, only contended that the adoption was illegal, inasmuch as it had taken place without the consent of the husband.

3dly. In the proceeding of this Court, and in the question propounded to the *pundits*, only the word "adoption" was at first mentioned: the word "second" was subsequently added at the request of the respondent's *vakeel*, as it was thought that it would not materially affect the decision. It was, however, mentioned that, according to the evidence, it was doubtful whether the ceremonies of adoption in the first case were regularly fulfilled.

heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithilá, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting.

Reason of its prevalence in Mithilá.

It is an universal rule in Bengal and Benares that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained; but it does not appear that the prohibition in Mithilá, which prevails against her receiving a son in adoption according to the *Dattaca* form, even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the *Critrima* form; and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband.* It is not uncommon in the province of Mithilá for the husband to adopt one *Critrima* son, and the wife another.

Sanction of the husband not requisite in this form of adoption.

The husband may have one *Critrima* son, and the wife another.

I have laid it down as a rule that in the present age adoption is allowable only in the *Dattaca*, *Duyamushyana*, and *Critrima* forms; but I find, on reference to the Elements of Hindu Law, that a question was agitated as to the admissibility of the *Crita*, or son bought. The point was much canvassed, and gave rise to a protracted controversy between two of the most eminent scholars of the day;† and there is a case in the Sudder Dewanny Adawlut Reports,‡ in which the claimant was alleged to be of the *Paunerbhava* class,§ and in which, in all probability, the claim

Of the *Crita* son.

Of the *Paunerbhava*.

* Suth. Synopsis, note 5, p. 222.
† See Elem. Hin. Law, App., p. 107 *et seq.*
‡ Vol i., p. 28.
§ See *Mitac.*, chap. i., sec. 2, § 8.

would have been adjudged, had it been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted that, generally speaking, there are only three species of adoption allowable in the present age, yet the rule should be qualified, by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus, it appears that the *Goswamis* and other devotees who lead a life of celibacy buy children to adopt them in the form termed *Crita*, or son bought; and that the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, still prevails in Orissa.* The son so produced is termed *Cshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers, in places where the *lex loci* would justify the affiliation.† In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden.‡ The other forms of adoption enumerated by *Menu*§ appear to be wholly obsolete in the present age. Any discussion, therefore, of their relative merits would be foreign to the purpose of this publication.

The *Goswamis* adopt in the *Crita* form.

Of the *Cshetraja*.

Other forms obsolete.

* Note to Dig., vol. iii., p. 267.
† See note, S. D. A. Reports, vol. ii., p. 175.
‡ *Jimutavahana*, cited in Dig., vol. iii., p. 493.
§ Institutes, chap. iv., §§ 159 and 160.

CHAPTER VII.

OF MINORITY.

Agreeably to the Hindu law, as current in the Benares and Mithilá schools, minority is held to last until after the expiration of sixteen years of age;* and according to the doctrine of Bengal, the end of fifteen years is the limit of minority.† Age of minority.

A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship;‡ but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations; and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternál kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and, failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardians universally rests with the ruling power.§

Of guardians.

Of the father's guardianship.

Of the mother's.

Of the paternal relations.

And of the maternal. Their appointment vested in the ruling power.

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* "Until the minors arrive at years of discretion:" in the sense of restriction, before they attain their seventeenth year.—The *Retnácara*. See Dig., vol. iv., p. 243. According to Colebrooke, sixteen years must be completed.—Elem. Hin. Law, App., p. 208.

† See Annotations on the *Dáyabhága*, p. 58; and Dig., vol. i., p. 300.

‡ And this has been held to include the stepmother, whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports, vol. ii., p. 144.

§ Dig., vol. iii., p. 544, and Elem. Hin. Law, App., p. 202.

Guardianship of a female; The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage rests with her father; if he be dead, with her nearest paternal relations.* After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian; in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship; and, in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and, failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

during coverture, and in widowhood.

The ruling power is the supreme guardian of all minors. The ruling power is in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female;† and it may here be mentioned that, agreeably to the regulations of Government, the state of minority is held to extend to the end of the eighteenth year.‡

Power of guardians over the property of their wards. As to the power of guardians over the property of their wards, I apprehend that much misconception exists. As I understand the provisions on the subject, "minors are, under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage."§ It has been laid down by Sir William Jones

* See Elem. Hin. Law, App., pp. 22 and 204.

† Thus the property of a woman, and the goods of a minor, falling into the king's power, should not be taken by him as owner: this has been already noticed. But it may be here remarked that the property of a minor should be entrusted to heirs, and the rest *appointed* with his concurrence, or, if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest." See Dig., vol. iv., p. 243.

‡ Section 2, Regulation XXVI., 1793.

§ Colebrooke on Obligations and Contracts, chap. x., § 585.

that "assets may be followed in the hands of any representative."* This is doubtless true, but a latitude has been given to the rule which the terms of it do not warrant. It has been held, I believe, that, for this purpose, a guardian may be considered as the representative of the deceased; whereas it is obvious that, *quoad hoc*, he is only the representative of his successor. I understand the expression to mean that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as those assets go, provided such heir have attained the age of majority; and that, where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account during his minority. And according to the Benares school, the debts of the father are binding on the son,† whether the former left property or not, as well as those of the grandfather; but he need not pay interest on the latter.

The following case arose but very lately in the Court of Sudder Dewanny Adawlut. A, a Hindu *zemindar* of Bengal, executed a deed of sale for a portion of his estate to B; B executing a separate engagement that the sale should be redeemable by re-payment of the money with interest within the term of a year. Before the term expired, the *zemindar* A died, leaving a widow and an adopted minor son, or rather a son adopted by authority, after his death, by the widow.

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* See note to Colebrooke's Translation of *Jagannátha's* Digest, vol. i., p. 266.

† But the obligation is considered only as a moral, and not a legal one, provided there are no assets. See Colebrooke, cited in App. Elem. Hin. Law, p. 347; but the same high authority has laid down as a principle, in his Treatise on Obligations and Contracts (chap. ii., § 51), that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, when its obligations are repudiated. And see Elem. Hin. Law, App., pp. 464 and 465.

Within a few days of the completion of the term when the sale would have become absolute and irrevocable, the widow, as guardian of the minor, borrowed money elsewhere of C, with which she paid the debt of B, and freed the land, executing to the lender a similar second sale of the same land, redeemable within a given term; which term, however, expired without re-payment on her part. The question then here was: First, Could any rule of Hindu law prevent the land from becoming the property of B, on the term of the first sale expiring without re-payment? Secondly, If there be no such rule, and the widow saved the land for a time by the second conditional sale, was it not a case of necessity, such as to justify her act in behalf of her ward, as clearly beneficial to him? Thirdly, If a father sell a portion of his land, with a condition for redemption, and his heir (a minor), or his guardian on his part, do not redeem, is not such land gone irrevocably? And fourthly, Do the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian? The substance of the reply of the Hindu law-officers consulted on this occasion was, that no necessity for the sale had been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained majority. Judgment was, however, given for the purchaser; and the following arguments were used on the occasion: That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would, of necessity, have fallen to the former creditor: That it was mere folly to urge that the act of the mother in saving it for a time, and obtaining a further period, was not to be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubtedly have become absolute to the creditor: That,

Question as to the liability of a minor and of his estate during his minority.

according to the invariable practice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for those debts, and that his power of selling outright, or conditionally, any part of or all his landed property, could not be questioned: That any other doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute; and that, if their minority, in such cases, must be considered a bar to foreclosure, and cause the transaction to run on fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present: That the doctrine maintained by the court appeared to be supported by the opinion of the commentator *Jagannátha*,* and that, though there should prove to be conflicting opinions as to the law, the established usage and practice ought to prevail: And, in short, that whatever might be the real doctrine of the Hindu law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious usages only, and not in matters of contract, of which nature the case in question appeared to be.

In answer to the above arguments, it may be observed that, supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed, too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemp-

* See Dig., vol. i., chap. 5, on payment of debts, and particularly text 172, as translated by Mr. Colebrooke.

tion on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was at the lender's own risk to take a mortgage, in which the borrower's interest might expire before the expiration of the term.

I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear, when disencumbered of the commentary of *Jagannátha*, whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed by texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yájnyawalcya* (191). It has thus been translated by Mr. Colebrooke, with a view to adapt it to the subsequent commentary of *Jagannátha:* "He who has received the estate of a proprietor, leaving no son *capable of business*, must pay the debts *of the estate*, or, on failure of him, the person who takes the wife of the deceased; but not the son whose father's assets are held by another." Now, here it must be observed that the words in *italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator. The original is *rikthagrahee*, or taker of the property. In the concluding part of the text it is distinctly stated that the son whose father's assets are held by another must not pay the debts. The next text is that of *Náreda* (172), which, agreeably to *Jagannátha's* comment, has been thus translated by Mr. Colebrooke: "Of the successor to the estate, the guardian of the widow and the son *not competent to the management of affairs*, he who takes the assets becomes liable for the debts: the son, *though incompetent*, must pay the *debt*, if there be no guardian of the widow, nor a successor of the estate; and the person who took the widow, if there be no successor to the estate, nor competent son."

Authorities on the subject cited.

Here the original does not mean a son incompetent from minority to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit, in the same manner as a son who does not inherit assets, is morally bound to pay his father's debts; and the object of the above text is to show the obligation under which he lies, if there be no successor to the estate, nor guardian of the widow. There is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian. Lastly come the two texts of *Catyáyana* and *Náreda* (187 and 188): "On the death of a father, *his debt* shall in no case be paid by his sons, incapable from non-age of conducting their own affairs; but at their full age *of fifteen years*, they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." "Even though he be independent, a son incapable from non-age of conducting his affairs is not *immediately* liable for debts." It will be observed that *Jagannátha*, in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts; but the text in the original is *apráptavyaváhara*, which clearly means one who has not attained the age prescribed for the management of affairs. It follows that where, owing to a son's minority, the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets to the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor

Conclusion, that the minor heir and his estate are not liable for the debt of his ancestor, until his majority.

before he can be liable. Nor does there appear to be much of hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will. All immoveable property, in the Hindu law, is subject to a kind of entail; so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral; and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son; for, as it is, he is bound, both legally and morally, to pay the debts; and it may be, perhaps, but just that the period for exacting payment should be postponed until he comes to years of discretion sufficient to enable him to realize the means of satisfying the creditors with the least detriment to himself. The assets cannot in the meantime be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand with interest. Especially in a case of mortgage, where the produce of the property or the usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindu law, for the usufruct of property is one species of legal interest which is called *bhogalábha*, or interest by enjoyment. The *pundits* being called upon to expound the law in a case involving a similar question* which was recently decided at Bombay, they declared that a woman who had succeeded, as heir-at-law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be observed, is a stronger case than the one above alluded to, because a son is bound to pay the debts of his father,

Cases cited in confirmation of the above opinion.

* Bombay Reports, vol. i., p. 176.

whether he inherits assets, or not; and by this decision it was determined that property to which he had a claim in expectancy only, could not be alienated for that purpose, until he attain the age of majority; and it was ruled also, in a case decided under the Madras Presidency, that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen.*

* Elem. Hin. Law, App., p. 206.

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APPENDIX.

ACT VI. OF 1871.

THE BENGAL CIVIL COURTS' ACT,* 1871.

S. 24. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

Certain decisions to be according to native law.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

ACT XXI. OF 1850.

PASSED ON THE 11TH APRIL 1850.

An Act for extending the principle of section 9, Regulation VII. 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.†

WHEREAS it is enacted by section 9, Regulation VII. 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties

Preamble.

* This Act is in force in Bengal and the N.-W. Provinces only.

† Declared to apply to the whole of British India, except the Scheduled Districts, Act No. XV. of 1874.

to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company; It is enacted as follows:—

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

1. So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritence, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste,"* shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.†

ACT XV. OF 1856.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 25TH JULY 1856.

An Act to remove all legal obstacles to the marriage of Hindu Widows.‡

Preamble.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such

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* 13 Beng. 25, 75—76.

† 9 Moo. I. A. 239.

‡ Declared to apply to the whole of British India, except the Scheduled Districts, Act No. XV. of 1874. As to the effect of unchastity in the case of a widow who has once inherited, see 13 Beng. I.

widows by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; It is enacted as follows:—

Marriage of Hindu widows legalized.

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her re-marriage.

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died;* and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Guardianship of children of

3. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted

* *Párvatí* v. *Bhikú*, 4 Bomb. A. C. J. 25. *Akora Suth* v. *Borcani*, 2 Beng. 198.

deceased husband on the re-marriage of his widow.

by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them, during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in ss. 2, 3, 4.

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property, or any right to which she would otherwise be entitled; and every widow who has re-married shall have

the same rights of inheritance as she would have had, had such marrriage been her first marriage.

6. Whatever words spoken, ceremonies performed, or engagements made, on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or, if she has no father, of her paternal grandfather, or, if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or, failing also brothers, of her next male relative.

Consent to re-marriage of minor widow.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both.

Punishment for abetting marriage made contrary to this section.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Effect of such marriage. Proviso.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

Consent to re-marriage of major widow.

THE HINDU WILLS' ACT,

No. XXI. OF 1870.

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the Towns of Madras and Bombay.

Preamble.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindu Wills' Act, 1870."

Certain portions of Act X. of 1865 extended to wills of Hindus, Jainas, Sikhs, and Buddhists.

2. The following portions of the Indian Succession Act, 1865, namely,—

sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive),

sections 82, 83, 85, 88 to 103 (both inclusive),

sections 106 to 177 (both inclusive),

sections 179 to 189 (both inclusive),

sections 191 to 199 (both inclusive),

so much of Parts XXX. and XXXI. as relates to grants of probate* and letters of administration with the will annexed, and

Parts XXXIII. to XL. (both inclusive), so far as they relate to an executor and an administrator with the will annexed,

shall, notwithstanding anything contained in section 331 of the said Act, apply—

Extent of Act.

(*a*) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September one thousand eight hundred and seventy, within the said terri-

* This makes "the probate evidence against all persons executor or others interested under the will," 8 Beng. 208, 220.

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tories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or limits:

3. Provided that marriage shall not revoke any such will or codicil: Provisos.

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section 2 of this Act, he could not deprive them by will:

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos*:

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September one thousand eight hundred and seventy.

4. On and from that day, section 2 of Bengal Regulation V. of 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal. Partial repeal of Bengal Regulation V. of 1799, section 2.

5. Nothing contained in this Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay, respectively.* Saving of rights of Administrator-General.

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* See Act II. of 1874.

Interpretation-clause.

6. In this Act and in the said sections and Parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively:

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, and 182 of the said Succession Act, to wills and codicils made under this Act, the words, "son," "sons," "child," and "children," shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son:

And in making grants, under this Act, of letters of administration with the will annexed, or with a copy of the will annexed, section 195 of the said Succession Act shall be construed as if the words, "and in case the Hindu Wills' Act had not been passed," were added thereto; and section 198 of the said Succession Act shall be construed as if, after the word "intestate," the words, "and the Hindu Wills' Act had not been passed," were inserted; and sections 230 and 231 of the said Succession Act shall be construed as if the words, "if the Hindu Wills' Act had not been passed," were added thereto, respectively.

ACT III. OF 1872.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 22ND MARCH 1872.

An Act to provide a form of Marriage in certain cases.

Preamble.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Pársí, Buddhist, Sikh, or Jaina religion, and

to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

1. This Act extends to the whole of British India. Local extent.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu or the Muhammadan, or the Pársí or the Buddhist, or the Sikh or the Jaina religion, upon the following conditions:— Conditions upon which marriages under Act may be celebrated.

(1.) Neither party must, at the time of the marriage, have a husband or wife living:

(2.) The man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar:

(3.) Each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage:

(4.) The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

3. The local Government may appoint one or more Registrars under this Act,* either by name or as holding any Appointment of Marriage Registrars.

* See *Calcutta Gazette*, 22nd May 1872, p. 2321:
Bombay Government Gazette, 26th September 1872, p. 1046:
Fort St. George Gazette, 24th December 1872, p. 2064.

office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under Act III. of 1872," and is hereinafter referred to as the "Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

Notice to be filed and copy entered in the Marriage Notice Book.

5. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III. of 1872," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Objection to marriage.

6. Fourteen days after notice of an intended marriage has been given under section 4, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if neces-

sary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure on receipt of objection.

7. On receipt of such notice of objection the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2.

Certificate of filing of suit to be lodged with Registrar.

8. The officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given, and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions

prescribed in clause (1), (2), (3), or (4) of section 2, the marriage shall not be solemnized.

Court may fine when objection not reasonable.

9. Any Court in which any such suit as is referred to in section 7 is filed, may, if it shall appear to it that the objection was not reasonable and *bonâ fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

10. Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I [*A*] take thee [*B*] to be my lawful wife (*or* husband)."

Place where marriage may be solemnized.

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire: Provided that the local Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office,* and the additional fees to be paid thereupon.

Certificate of marriage.

13. When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose, and to be called the "Marriage Certificate Book under Act III. of 1872," in the form given in the

* See *Calcutta Gazette*, 22nd May 1872, p. 2322.

third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

14. The local Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act.* Fees.

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said Marriage Certificate Book shall, at all reasonable times, be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall, on application, be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the local Government for each such extract.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be; and the marriage so solemnized is void. Penalty on married person marrying again under Act.

16. Every person married under this Act, who, during the life-time of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the life-time of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage. Punishment of bigamy.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, Indian Divorce Act to apply.

* See *Calcutta Gazette*, 22nd May 1872, p. 2322:
Bombay Government Gazette, 26th September 1872, p. 1047:
Fort St. George Gazette, 24th December 1872, p. 2064.

and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2 of this Act.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisoes to section 2 of this Act shall apply to them.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

20. [*Repealed by Act No. XII. of 1876.*]

Penalty for signing declarations or certificates containing false statements.

21. Every person making, signing, or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

FIRST SCHEDULE.

(See section 4.)

NOTICE OF MARRIAGE.

To , a Registrar of Marriages under Act III. of 1872, for the District.

I hereby give you notice that a marriage under Act III. of 1872 is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Names.	Condition.	Rank or Profession.	Age.	Dwelling place.	Length of residence.
A. B.	*Unmarried. Widower.*	*Land-owner.*	*Of full age.*	...	23 *days.*
C. D.	*Spinster.*	...	*Minor.*	...	...

Witness my hand, this day of 187 .

(Signed) *A. B.*

SECOND SCHEDULE.

(See section 10.)

Declaration to be made by the Bridegroom.

I, *A B*, hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Pársí, Buddhist, Sikh, or Jaina religion :

3. I have completed my age of eighteen years :

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisoes of clause (4) of section 2 of Act III. of 1872, render a marriage between us illegal:

[*And when the bridegroom has not completed his age of twenty-one years:*

5. The consent of my father [*or* guardian, *as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if, in making such statement, I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(Signed) *A B* [*the bridegroom*].

Declaration to be made by the Bride.

I, *C D*, hereby declare as follows:—

1. I am at the present time unmarried:

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Pársí, Buddhist, Sikh, or Jaina religion:

3. I have completed my age of fourteen years:

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisoes of clause (4) of section 2 of Act III. of 1872, render a marriage between us illegal:

[*And when the bride has not completed her age of twenty-one years, unless she is a widow:*

5. The consent of *M N*, my father [*or* guardian, *as the case may be*], has been given to a marriage between myself and *A B*, and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if, in making such statement, I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(Signed) *C D* [*the bride*].

Signed in our presence by the above-named *A B* and *C D:*

G H,
I J, } [*three witnesses*].
K L,

[*And when the bridegroom or bride has not completed the age of twenty-one years, except in the case of a widow:*

Signed in my presence and with my consent by the above-named *A B* and *C D:*

M N, the father [*or* guardian] of the above-named *A B* [*or C D, as the case may be*].

(Countersigned) E F,

Registrar of Marriages under Act III. of 1872 for the District of

Dated the day of 18 .

THIRD SCHEDULE.

(See section 13.)

Registrar's Certificate.

I, *E F*, certify that, on the of 18 , appeared before me *A B* and *C D*, each of whom in my presence and in the presence of three credible witnesses, whose names are signed hereunder, made the declarations required

by Act III. of 1872, and that a marriage under the said Act was solemnized between them in my presence.

(Signed) . *E F,*

Registrar of Marriages under Act III. of 1872 for the District of

(Signed) *A B,*
C D,

G H,
I J, } *three witnesses*].
K L,

Dated the day of 18 ..

THE INDIAN MAJORITY ACT,

No. IX. OF 1875.

An Act to amend the law respecting the age of majority.

Preamble. WHEREAS, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority than now exists; It is hereby enacted as follows:—

Short title. 1. This Act may be called "The Indian Majority Act, 1875."

Local extent. It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty.

Commencement and operation. And it shall come into force and have effect only on the expiration of three months from the passing thereof.

2. Nothing herein contained shall affect—

(*a*) the capacity of any person to act in the following matters (namely),—Marriage, Dower, Divorce, and Adoption;

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or

(*c*) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

Age of majority of persons domiciled in British India.

3. Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X. of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

Age of majority how computed.

4. In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day.

Illustrations.

(*a*.) Z is born in British India on the first day of January, 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January 1871.

(*b*.) Z is born in British India on the twenty-ninth day of February, 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(*c*.) Z is born on the first day of January, 1850. He acquires a domicile in British India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868.

A SUMMARY OF HINDU LAW.

INTRODUCTION.

The laws of the Hindus, civil and religious, are by them believed to be alike founded on revelation, a portion of which has been preserved in the very words revealed, and constitutes the Vedas, esteemed by them as sacred writ. Another portion has been preserved by inspired writers, who had revelation present to their memory, and who have recorded holy precepts, for which a divine sanction is to be presumed. This is termed *smriti*, recollection (remembered law), in contradistinction to *sruti*, audition (revealed law). (Strange's Hindu Law, p. 315.)

The written law, the *smriti* as well as *sruti*, had many commentators. Each commentator, under the guise of interpretation, often moulded the ancient texts according to his own views of justice or expediency. And as the authority of each commentator was received in some places, and rejected in others, there arose what have been styled the different schools of Hindu law. They are five in number, viz., the Benares, Mithila, Bengal, Dravida, and Maharastra schools. (Strange's Hindu Law, pp. 315 to 319.)

Upon points of Hindu law, which are of general application, the authorities of any school may be indiscriminately cited, so long as they do not contravene the rules of law which have obtained exclusively in a particular province. (Cowell's Hindu Law, vol. i., p. 16.)

Hindu law has obligatory force only upon those who are, Hindus both by birth and religion. When a Hindu is converted to Christianity or to Mahometanism, and has shown by his course of conduct after his conversion, what rules and customs he has adopted, he is released from the trammels of

Hindu law, and is thenceforth governed by the law and usage of the class with which he has associated himself. Otherwise conversion to Christianity or Mahometanism does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity or Mahometanism has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law, or by any other positive law, may, by his course of conduct after his conversion, show by what law he intends to be governed as to these matters. He may do so, either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or by himself observing some family usage or custom. Nothing could be more just than that the rights and interests in his property, and his powers over it should be governed by the law which he adopts, or the rules which he observes. Since, upon the conversion of a Hindu to Christianity or to Mahometanism, the Hindu law ceases to have any continuing obligatory force upon the convert, so he may renounce the old law by which he was bound, as he has renounced his old religion; or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion. (*Abraham* v. *Abraham*, 9 Moore's Indian Appeals, p. 195.)

Hindu law is a personal and not a local law. A Hindu may import into any country to which he migrates the particular law of his own tribe. Although the presumption is in favour of a Hindu retaining the shasters of his birth, yet the principle has been definitely affirmed, that a Hindu may, if he chooses, change the shasters or school of law by which he wishes to be governed. (*Ranee Pudmavati* v. *Baboo Doolar Sing and others*, 4 Moore's Indian Appeals, p. 259.) The real test to be applied is by what shasters the customs and rites of marriages and funerals are conducted; occasional or daily religious services may be changed without

effecting a corresponding change in a Hindu's legal liabilities. (*Koomud Chunder Roy* v. *Seetakant Roy*, Suth. F. B. 75.)

Property, according to the Hindu law, is of two descriptions, real (or immoveable) and personal (or moveable); which are further distinguished as ancestral and self-acquired. Moreover, the thing itself, whether moveable or immoveable, which is the subject of property, is capable of division into its component parts, whether by division of the thing itself, or of the mode of its enjoyment. The various holdings of immoveable property, or, in other words, tenures in land, are instances of it, and every tenure is as distinct a subject of property as is the land itself. (Cowell's Hindu Law, vol. i., p. 82.)

It is now clearly settled, beyond all further question, that the Hindu law, according to the school of Bengal, makes no distinction between ancestral and self-acquired property as respects the right of alienation by sale, gift, will, or otherwise. Hence, in Bengal, a Hindu who has sons or other heirs can sell, give, or pledge as he pleases, without their consent, immoveable or moveable property, whether ancestral or acquired, and can, by will, prevent, alter, or affect their succession to such property. (*Tagore* v. *Tagore*, 4 B. L. R., O. C., p. 159.)

Except in Bengal, the right of a Hindu in ancestral real property is always limited; any alienation by the occupant, without the consent of all the heirs (*i. e.*, sons, grandsons, and great-grandsons, whose rights in such property are declared to be equal to that of the occupant itself), or made without proof of legal necessity, or of its being made for the benefit of minors, or under such circumstances as to render the father the agent of the family for that purpose, is void. With respect to personal property of every description, whether ancestral or acquired, and with respect to real pro-

perty acquired or recovered by the occupant, every Hindu is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.

II.—INHERITANCE.

(*a*) All legitimate sons,* living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired.

(*b*) In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

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* The right of representation is admitted as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed, the term *putra* or son has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted son is a substitute for a son of the body where none such exists, and is entitled to the same rights and privileges.

Where a legitimate son is born subsequently to adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools. If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.

There is a case on record, in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each (a distribution technically termed *patnibhága*), averring that such had been the *kulachar*, or immemorial usage of the family; but the court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons; being of opinion that, although, in cases of inheritance, *kulachar*, or family usage, has the prescriptive force of law, yet to establish *kulachar* it is necessary that the usage have been ancient and invariable. In the succession to principalities and large landed possessions, long-established *kulachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke that the great possessions called *zamindáris*, in official language, are considered by modern Hindu lawyers as tributary principalities.

(*c*) In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled had they survived.

(*d*) In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits.* But her interest is not absolute.

(*e*) In default of the widow, the daughter inherits.† First the unmarried, then the married daughters. The interest of the daughter also is not absolute.

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* According to the law of Bengal, the widow inherits, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only, an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal. If a man die leaving more than one widow (three widows, for instance), the property is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

† According to the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession; and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

According to the Benares school, in default of the widow, the maiden daughter inherits. Failing her, married indigent daughters. In default of indigent daughters, the wealthy daughters inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren, or a childless widow.

According to the law of Mithila, there is no distinction among married daughters, whether they are indigent or wealthy, widowed and barren, or having or likely to have male issue.

The above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for, according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them.

(*f*) In default of the qualified daughters, daughter's sons inherit.* They take *per capita*, and not *per stirpes*.

(*g*) In default of daughter's sons, the father inherits, according to the Bengal school.†

(*h*) In default of the father, the mother ‡ (but not the step-mother) inherits. Her interest also is not absolute.

(*i*) In default of father and mother, brothers inherit. §

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* The right of daughter's sons is not recognized by the Mithila school. If there be sons of more than one daughter, they take *per capita*, and not, as the son's sons do, *per stirpes*. If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters, or sister's sons, then, according to the law of Bengal, the sons alone take the share to which the mother was entitled, to the exclusion of the sisters and the sisters' sons; and if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters, or sisters' sons according to the same law, the sisters exclude the sons: and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail anywhere but in Bengal.

Under no circumstances, can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go as her *stridhun* to her own heir.

† But according to other schools, the mother succeeds to the exclusion of the father.

‡ Her interest, however, is not absolute, and is of a nature similar to that of a widow. On her death, the property devolves on the heirs of her son, and not on her heirs.

§ First, the uterine associated brethren; secondly, the unassociated brethren of the whole blood; thirdly, the associated brethren of the half-blood; and, fourthly, the unassociated brethren of the half-blood. The above order supposes that the deceased had only uterine or only half-brothers, and that they were all united or all separated. But if a man die, leaving an uterine brother separated, and a half-brother associated or re-united, these two will inherit the property in equal shares.

Sisters are not enumerated in the order of heirs.

A brother's son (his father being dead) is not entitled to inherit together with the brother (*i. e.*, his uncle).

A case occurred in which the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing, that on the death of the first brother the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and consequently the brother who died during her life-time could not have transmitted to his son a right which never appertained to himself

(*j*) In default of brothers, their sons inherit.*

(*k*) In default of brother's sons, their grandsons inherit in the same order, and in the same manner, according to the law as current in Bengal.†

(*l*) In default of brother's grandsons, sister's sons inherit according to the law of Bengal. ‡

(*m*) In default of sister's sons, the inheritance is thus continued agreeably to the doctrine of the Bengal school, as laid down in the *Dayakrama-sangraha*:—Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather; the maternal uncle; his son and grandson and daughter's son; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfather,

* But in regard to their succession there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brother's sons alone as nephews, they take *per capita*, as daughter's sons do.

† But the law of Benares, Mithila, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.

‡ But, according to other schools, the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son, also, is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Adawlut, in which the suit being for the landed estate of a deceased Hindu, situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled that, according to the law of Bengal, the plaintiff would be heir, but, according to the law of Mithila, the defendant.

There is a difference of opinion among different writers of the Bengal school as to the whole and half-blood; some maintaining that an uterine sister's son excludes the son of a sister of the half-blood; but according to the most approved authorities, there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs.

his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow-student; those bearing the same name; those descended from the same patriarch; Brahmins learned in the *Vedas;* and, lastly, to the king, to whom, however, the property of Brahmins can never escheat, but must be distributed among other Brahmins.

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivadachandra,* the *Vivadaratnakara,* and *Vivadachintamani,* authorities which are current in Mithila, do not enumerate the daughter's son among the series of heirs. The mother ranks next in the order of succession, and after her the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood. In their default their sons inherit successively; then the paternal grandmother; next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother; the paternal great-grandfather, his son and grandson successively; the paternal great-grandfather's mother; his father, his brother, his brother's son. In default of all these, the *sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *sapindas,* the *samanodakas* succeed: and these include the above

enumerated heirs in the same order as far as the fourteenth in degree. In default of the *samanodakas*, the *bandhus* or cognates succeed. These kindred are of three descriptions: personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle. In default of them, the *Acharya* or spiritual preceptor: the pupil, fellow-student in theology, learned Brahmins; and lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

The order of succession as it obtains in Mithila corresponds with what is here laid down.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavaharamayuk'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister, the paternal grandfather, and the brother of the half blood, who inherit together. In default of these, the *sapindas*, the *samanodakas*, and the *bandhus* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all schools, that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule.*

* For instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter.

III.—EXCLUSION FROM INHERITANCE.

The disqualified persons enumerated by *Menu* are, viz., impotent persons [outcasts], persons born blind and deaf, mad men, idiots, dumb, and those who have lost a sense or a limb; to which may be added persons affected with grievous and incurable malady, such as leprosy (not in a mild and simple form, but when it assumes a virulent and aggravated type). As regards loss of caste, it may be observed that any forfeiture of rights on any person on account of his renouncing his religion or being deprived of caste has ceased to be enforced as law.

Food and raiment should be given to the disqualified persons, except to the outcast and his son begotten after his degradation; but the sons of the disqualified persons being free from similar defects shall obtain their father's share of the inheritance.

IV.—STRIDHUN, OR WOMAN'S SEPARATE PROPERTY.

Stridhun has been thus defined by *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the six-fold separate property of a married woman."

This description of property is not governed by the ordinary rules of inheritance. The succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

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* To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively, and, failing these, her paternal kinsmen in due order.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first, and then the married daughter likely to have male issue. (It may be here mentioned that at the death of a

Stridhun which has once devolved according to the law of succession which governs the descent of this peculiar species of property ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance.*

The Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. The husband has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.

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maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having and likely to have male issue; and in their default, on the barren widowed daughters.) The barren and widowed daughters, failing the two first, succeed as co-heirs. In default of daughters, the son succeeds; then the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the first five forms, the husband succeeds, and the brother, the mother, the father. But if celebrated according to any of the three last forms, the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in-law, the father-in-law, the elder brother-in-law, the *sapindas*, the *sakulyas*, the *samanodakas*.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are successively a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son.

* For instance, property given to a woman on her marriage is *stridhun*, and passes to her daughter at her death; but at the daughter's death it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

V.—PARTITION.

The father's consent is requisite to partition, and while he lives, the sons have not, according to the law of Bengal, the power to exact it, except under such circumstances as would altogether divest him of his proprietary right,* such as his degradation or his adoption of a religious life.

According to the Bengal school, the father may make an unequal distribution of ancestral and acquired property, moveable and immoveable; but cannot make it with respect to ancestral immoveable property and estate, to the acquisition of which his sons may have contributed: of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.†

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. There is also another provision which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and according to the Bengal school, the widow is not only entitled to share an undivided

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* But, according to the other schools, partition of the ancestral estate may be enforced at the pleasure of the sons, if the mother be past child-bearing, even though the father retain his worldly affections, and though he be averse to partition.

† The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot reserve more than two shares for himself; and as the maxim of *factum valet* does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illegal.

estate with the brethren of her husband,* but she may require from them a partition of it. Partition may be made also while the mother survives. Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren. They take *per stirpes*, and any one of the coparceners may insist on the partition of his share.

But in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance.†

To the unmarried daughters such portions are allotted as may suffice for the *due* celebration of their nuptials.

Any improvement of joint property effected by one of the brethren does not confer on him a title to a greater share; but an acquisition made by one, by means of *his own unassisted and exclusive labour*, entitles the acquirer, according to the law of Bengal, to a double share on partition.‡ If the patrimonial stock was used, all the brethren share alike. If the joint stock have not been used,§ he by whose sole labour the acquisition has been made is alone entitled to the benefit of it.

And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an

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* The reverse is the case, according to the law of Benares.

† But according to the *Mitacshara* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and stepmother.

‡ It was accordingly ruled, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other three. But according to the law as current in Benares, the fact of one brother having contributed personal labour, while no exertion was made by the other, is not a ground of distinction.

§ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits.

undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren. It has also been ruled that, if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share, and that, if they were acquired by the joint labour and capital of one, and by the labor only of the other, two-thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity, than any specific rule of Hindu law.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition. An undivided residue is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property.

VI.—OF THINGS IMPARTIBLE.

Although by Hindu law, as understood in all the schools, the wealth of the father becomes, at least at his death, divisible amongst all his sons, yet there are exceptions to the rule, some properties being regarded as in their nature or on the ground of long usage impartible, and others being reserved exclusively to one co-parcener by the title of exclusive acquisition. To the former class belong principalities and extensive zamindáris in the case of great families, when it is shewn that the usage has prevailed for a very long series of years, sufficient to control the general law of inheritance.*

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* With respect to a raj as a principality, the general rule is that it is impartible. (*Baboo Gunesh Dutt Singh* v. *Maharajah Moheshur Singh*, 6 Moore's Indian Appeals, p. 187.)

A Polliam is a tract of country subject to a petty chieftain. It is in the nature of a raj. It may belong to an undivided family, but it is not the subject of partition. It can be held by only one member of the family at a time, who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

The impartibility of property self-acquired by one of the members of an undivided family is so explicitly recognized by the older authorities that no doubt could ever have rested upon the doctrine so established. Even a building erected on the joint estate by one member at his own expense remains his separate acquisition, and is not divisible. "A house, garden, or the like," says the author of the Dayabhaga (chap. ii., sec. vi., verse 30), "which one of the co-heirs has constructed within the site of the dwelling-house during the father's life-time, remains his indivisible property, for his father has assented by not forbidding the construction of it."

The gains of science are also excluded from partibility. But the ordinary gains of learning or science, which have been taught at the expense of the family-fund, are subject to partition.

Places of worship and sacrifice are impartible. To divide buildings used for those purposes would be to render them utterly unsuited for the purposes and objects for which they are intended. Parties jointly entitled to the use of such buildings "can enjoy their turn of worship, unless they can agree to a joint worship, and any infringement of the right to a turn in the worship can be redressed by a suit." "We cannot," said the High Court of Bengal, "permit the object for which they were erected to be neutralized by dividing them."

Dewuttur lands also are impartible. Those for whose benefit they are dedicated can by consent form separate religious establishments, and assign to each a *palla* or turn of worship. (*Elder widow of Rajah Chutter Sein* v. *Younger widow of ditto*, Select Reports, new edition, vol. i., p. 239.)

With regard to effects which are not liable to partition, the author of the Mitakshara quotes the text of Yajnavalkya (Mitakshara, chap. i.,

VII.—MARRIAGE.

Marriage among the Hindus is not only a civil contract, but a sacrament; and an unmarried man has been declared to be incapacitated for the performance of religious ceremonies.

There are eight forms of marriage: the *Brahma, Daiva Arsha, Prajapatya, Asura, Gandharva, Rakshaha,* and *Paisacha.**

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu*:—"She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not known by her family name

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sec. iv., verse 1):—"Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs, nor shall he who recovers hereditary property which had been taken away give it up to the parceners, nor what has been gained by science."

Again, the ornaments and clothes worn by each person are exclusively his, but what has not been used is common and liable to partition. (Mitakshara, chap. i., sec. iv., verse 19.)

Again, what is obtained through the father's favour is exempt from partition according to a text of Yajnavalkya. "Effects which have been given by the father or by the mother belong to him in whom they were bestowed." (Mitakshara, chap. i., sec. iv., verse 28, and sec. vi., verse 13.)

Self-acquired property is exempt from partition, provided it be acquired without detriment to, or use of, the joint estate. So also articles of personal use, and things which are in their nature indivisible, such as a common road, are exempted.

Jimutavahana treats in the sixth chapter of the Dayabhaga upon the subject of impartibility, and enumerates the following as exempt from partition: (1) The gains of science obtained from displaying and making known one's own knowledge; (2) gains of valour; (3) wealth received on account of marriage at the time of accepting a bride; (4) items of property required for personal use. Again, "a house, garden, or the like, which one of the co-heirs had constructed within the site of the dwelling-place during his father's life-time, remains his indivisible property, for his father has assented by not forbidding the construction of it."

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* The first four forms are peculiar to the Brahminical tribe; the fifth to Vaisyas and Sudras; the sixth and seventh to the *Kshatrya;* and the last is reprobated for all. In the *Brahma* nuptials, the damsel is given

to be of the same primitive stock with his father and mother, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, as well as a civil, offence, and an action for damages as preferred by the husband seems to lie against the adulterer.

In all cases, and for whatever cause (except adultery), a wife may have been deserted, she is entitled to sufficient maintenance.*

Coverture incapacitates a woman from all contracts,† with certain exceptions.

(by the father) when he has decked her as elegantly as he can, to the bridegroom, whom he has invited; in the *Daiva*, to the priest employed in performing the sacrifice; in the *Arsha*, to the bridegroom, from whom he receives (for religious purposes) a bull and a cow. When the father gives her to a suitor, saying 'perform all duties together,' the marriage is named *Prajapatya* or *Kaya*, and a son produced by it confers purity on himself and on six descendants in the male line: an *Asura* marriage is contracted by receiving property from the bridegroom; a *Gandharva*, by reciprocal amorous agreement; a *Rakshasa*, by seizure in war; a *Paishacha*, by deceiving the damsel.

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* In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *stridhun*, or make it up to her, if she have; but he is not required in any case to assign more than a third of his property.

Among the many faults for which a wife may be lawfully deserted, the chief are, barrenness, insanity, adultery, waste of her husband's property, drunkenness, an incurable and grievous malady (as leprosy and the like), and degradation from caste.

† But those contracts are valid and binding, which are made by wives, the livelihood of whose husbands chiefly depends upon their labour; so also are those made for the support of the family during the absence or disability, mental or corporeal, of the husband. But the correct opinion seems to be that, except in cases where, by the Hindu as by the English law, she may be reasonably taken to have contracted merely as the agent or servant of her husband, she is fully capable of entering into any lawful contract, whether she has separate property or not.

VIII.—ADOPTION.*

In the present age, two, or at the most three, forms of adoption only are allowed: the *Dattaka* or son given, the *Kritrima*† or son made, and the *Dwyamushayana* or son of both fathers. The *Dattaka* and the *Kritrima*‡ are the most common.

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* A son of any description should be anxiously adopted by one who has no male issue, for the funeral cake, water, and solemn rites, and for the celebrity of his name. The following texts of *Menu* contain some of the requisite conditions for the adoption of a son:—

"He whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, the *gift being confirmed by pouring water.*" "He is considered as a son made or *adopted*, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."

† The *Kritima* form of adoption.—It prevails only in Mithila. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, party. There is no restriction except as to tribe, it being requisite that the tribe of the adopting father and the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies, so much so that it has been said that a man may adopt his own brother, or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family, and he takes the inheritance both of his own family and that of his adopting father. Another peculiarity of this species of adoption is, that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband; and the express consent of the person nominated for the adoption must be obtained during the life-time of the adopting party. This relation of *Kritrima* son extends, as has already been observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.

‡ The *Dwyamushayana.*—In this peculiar species of adoption, the adopted son still continues a member of his own family, and partakes of the estate both of his natural and adopting father, and, so inheriting, is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply. It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayana*; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayana;* and in this latter case, the connection between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family. With a legitimate son subsequently born, the *Dwyamushayana* takes half a share of his adopting father's property.

It is an universal rule in Bengal and Benares, that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained.* The competency of a widow to adopt a son, with the sanction of her husband expressed before his decease, is fully established.† It has been ruled that in the case of an adoption made by a widow without having obtained the consent of her husband (or in which the adopted son shall not have been delivered over to her by either of his parents, but only his brother) the adoption is invalid. It is required that the party adopting should be destitute of a son, and son's son, and son's grandson; that the party adopted should neither be the only nor the eldest son, nor an elder relation, such as the paternal or maternal uncle; that he should be of the same tribe as the adopting party; that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son.‡ It is lastly requisite that the adopted son should be initiated in the name of the family of the adopting party, with the *prescribed form* and *solemnities*.§

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* But it does not appear that the prohibition in Mithila, which prevails against her receiving a son in adoption according to the *Dattaka* form, even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the *Kritrima* form: and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband. It is not uncommon in the province of Mithila for the husband to adopt one *Kritrima* son, and the wife another.

† According to the law of the western provinces, a woman can adopt a son, with the sanction of her husband's kindred, after his death.

‡ This last rule, however, applies only to the three superior classes, and does not extend to Sudras.

§ The adoption being once completed, the son adopted loses all claim to the property of his natural family, but he is estranged from his own family only partially; for the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded. He becomes (with the exception above noticed) to all intents and purposes a member of the family of his adopting father.

If a man has a son, and the son of an elder son deceased, he may give the former away in adoption. Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous. It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another. It seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead; and it has also been ruled that authority to a wife to adopt, in the event of a disagreement between her and a son of the husband, then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.*

The adopted son succeeds to his adopting father's property *collaterally as well as lineally*, and, excepting the case of *Dwyamushayana*, is excluded from participating in his natural father's property. He has also no legal claim to the property of a *Bandhu* or cognate relation, *e. g.*, an adopted son cannot inherit the property of his adopting mother's father.

A boy adopted by a widow with the permission of her late husband has all the right of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be, that there is no defined and universally applicable rule as to

* In the case of a Hindu of Bengal dying in his father's life-time without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.

the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure according to one opinion, and of investiture according to another, has not been performed in the family of the natural father.

According to the *Dattaka Mimansa* the period fixed beyond which adoption cannot take place is the age of five years.

In the *Dattaka Chandrica* the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic chords, which ceremony is termed *Upanyana*, and is subsequent to that of tonsure or *Churakarana*; and with respect to Sudras, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. It should be observed, however, that where the ceremony of *Upanyana* has once been performed, an insurmountable bar to adoption is thereby immediately created.

Although it may be asserted that, generally speaking, there are only three forms of adoption allowable in the present age, yet the rule should be qualified by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus, it appears that the *Goswamis*, and other devotees who lead a life of celibacy, buy children to adopt them in the form termed *Krita*, or son bought; and that the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, still prevails in Orissa. The son so produced is termed *Kshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers in places where the *lex loci* would justify the affiliation.

IX.—MINORITY.

Minors* are, under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by anything to their disadvantage.

A question arose whether the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian; and it was determined that, according to the invariable practice of the Courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for his just debts, especially where he has pledged his land as security for those debts, and that this power of selling outright or conditionally any part of or all his landed property could not be questioned.

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* A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship: but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and, failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power.

The guardianship of a female (whether she be a minor or an adult), until she be disposed of in marriage, rests with her father: if he be dead, with her nearest paternal relations. After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian: in default of him, her sons, grandsons, and great-grandsons, are competent to assume the guardianship; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and, failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

X.—WIDOW'S RIGHTS AND POWERS.

A widow inheriting her husband's property has not an absolute proprietary right, but she is only a holder in trust for certain uses, and, should she make waste, they who have the reversionary interest have clearly a right to restrain her from doing so. But she is allowed to alienate by sale any part or the whole of her husband's property as may be necessary for the payment of his debts, for her own subsistence, for the support of her husband's family, for the performance of exequial rites, for the benefit of his soul, and for the payment of the Government revenue, with or without the consent of her kinsmen or next heirs. In all other instances, the consent of her husband's next male heir is absolutely necessary. Those of the nearest relations of the husband are alone entitled to inherit who survive the widow, and not the heirs of those who lived at the time of her husband's death, but died during the widow's life-time. If a widow, having succeeded her husband, should dispose of his property by gift or other alienation with the sanction of her husband's next male heir, and the heir consenting die before the widow, then the heir who succeeds in default of the consenting party, on the widow's death, cannot question the validity of such an alienation; for the rule is, if any alienation of a widow's inherited property take place with the consent of the then living heir, its validity cannot be questioned hereafter even by the contingent next heir.

XI.—MAINTENANCE.

A widow, upon making out a sufficient case, may compel the son of her husband to make an adequate allowance for her maintenance. Lands assigned by a *zamíndár* to his step-mother, as personal maintenance, cannot be alienated by her, but on her death will revert to the *zamíndár*. A Hindu widow may only sell for her maintenance when the

property is of such a nature that, without a sale, she cannot maintain herself *ab initio;* and a party purchasing is bound to see that she exercises her power of sale strictly. On partition of the property of a deceased Hindu amongst his sons, it was held that, after the partition, they were each liable for a share of the maintenance of their father's widow. In the construction of a Hindu's will, his widow's right to maintenance will never be barred by implication. If an estate is sold upon which a widow has a claim to maintenance, she can sue to make her claim a charge upon the property sold. A widow's right to maintenance does not cease on her leaving her husband's house. A Hindu widow is entitled to maintenance out of her husband's estate in proportion to the value and magnitude of the property, and may even file a bill against her own son (when there has been exclusion) to have that maintenance ascertained and secured for her. The amount of maintenance can be increased and decreased on sufficient cause being shown.

EXTRACTS.

HINDU LAW AT THE PRESENT DAY.

(Cowell's Hindu Law, vol. i., p. 2.)

With Hindu law, as it may have been ages ago, or as it was originally declared by the ancient authorities, we have to do only as with the ancient framework of an historic society. The early precepts of the Hindu law-givers have been controlled by the vicissitudes of experience; and the rules of law, which at the present day govern the lives and property of Hindus, depend partly upon the doctrines received by the various schools of interpretation of the sacred text, and partly upon the usages which have obtained in particular classes or localities, and are adapted to existing habits and customs, subject to such modifications, changes, and improvements, as have been, from time to time, introduced during the last century by the action of the English Legislature and the decisions of English Courts.

HINDU LAW TO WHOM APPLICABLE.

(Cowell's Hindu Law, vol. i., pp. 3—6.)

Hindu law has obligatory force only upon those who are Hindus both by birth and by religion. When a Hindu is converted to Christianity or to Mahometanism, and has shown, by his course of conduct after his conversion, what rules and customs he has adopted, he is released from the trammels of Hindu law, and is thenceforth governed by the law and usage of the class with which he has associated himself.* And even within the limits of that large community which

* *Abraham* v. *Abraham*, 1 S. W. R., P. C., 5; and 9 Moore's I. A. 227.

is Hindu both by birth and by religion, there is considerable scope for personal choice as to the school of law by which the individual or the family is to be governed. For, as families or individuals migrate from one country to another, they may choose whether they will retain the shasters and usages prevalent in the country which they leave, or adopt those which they find to be general in the country in which they settle.

This freedom of choice, as to the particular shasters or school of law by which he was to be governed, was declared to be the right of a Hindu by an early decision* of the Privy Council. Neither the *situs* of the property, nor the domicile of the owner, determines the law which affects his rights. A Hindu may import into any country to which he migrates the particular law of his own tribe, the governing circumstance to be attended to in deciding by what law he is bound being the intention as manifested by the character of the purohit, ceremonies and usages, which he, or his descendants after him, retains about him. Whatever, therefore, may have been the case formerly, and whatever may be the

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* *Rutcheputty Dutt Jha and others* v. *Rajunder Narain Rae and others*, 2 Moore's I. A. 132. The point at issue in this case was whether the laws, according to the shasters current in Mithila, should govern the right of succession to property derived from an ancestor who had originally emigrated from that district, and whose descendants had uniformly retained in Bengal the religious ceremonies and usages to which the family had been accustomed. It had been held by the Sudder Dewanny Adawlut† in 1801 that, if a person of Mithila family living in Bengal continue the observance of the Mithila shasters on occasions of marriages and mournings in his family, and have a Mithila purohit, or priest, to perform his ceremonies, his legal rights were to be determined according to the Mithila shasters; but that, if those ceremonies were performed by him according to the Bengal shasters, his rights should be determined by the Bengal shasters. The same doctrine was affirmed in the case of *Ranee Sreemutty Debea* v. *Ranee Rung Luta*, 4 Moore's I. A. 292, where a family of Sutgop Brahmins migrating from Bengal to Midnapore, where the Mitakshara law prevailed, were held to be subject to Bengal law in respect to inheritance to property situated in Midnapore, they being shown to have performed their religious ceremonies according to the Bengal authorities.

† *Rajchunder Narain Chunder Chowdhry* v. *Goculchand Goh*, Reports of Select Cases, vol. i. (new edition), p. 56.

case now, where a Hindu passes from one native territory to another, he nevertheless can move from one district to another within the limits of British territories, and carry with him, as a personal law applicable to his family and his possessions, the rules of the shasters under which he has lived up to the time of his migration. Further than this, the doctrine* is now established, that a Hindu so migrating must be presumed, until the contrary be shewn, to have brought with him and retained all his religious ceremonies and customs, and consequently the law of succession and of property which is associated with them. This is more especially the case when the family is shewn to have brought with it its own priests who continue their ministrations. Although the presumption is in favour of a Hindu retaining the shasters of his birth, yet the principle has been definitively affirmed by the Privy Council, that a Hindu may, if he chooses, change the shasters or school of law by which he wishes to be governed.† The real test to be applied is by what shasters the customs and rites of marriages and funerals are conducted; occasional or daily religious services may be changed without effecting a corresponding change in a Hindu's legal liabilities.‡

The principle thus laid down is consistent with the theory that Hindu law is a personal law, one that applies in its various forms to individuals and families, and not to localities, and has been secured to Hindus chiefly because it is so

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* *Nobinchunder Perdhan* v. *Janardhun Misser*, Suth. F. B. Rulings, 67.

† *Ranee Pudmavati* v. *Baboo Doolar Sing*, reported in 4 Moore's I. A., 259, was a case of a family of Bengalee Sudras which had migrated at a remote period from the district of Burdwan to the district of Purneah. A number of customs were described which the Hindu law-officer declared to be part of the Mithila law, and it was held that the family, although originally subject to Bengal law, had, since their migration, adopted and performed the religious rites and ceremonies of Mithila, and were therefore subject to its law.

‡ *Koomud Chunder Roy* v. *Seetakanth Roy*, Suth. F. B. 75; *Ranee Pudmavati* v. *Baboo Doolar Sing*, 7 S. W. R., P. C., 41.

largely (to an extent which these lectures must describe) associated with their religion. The designation of the different schools is derived from the names of provinces, and it is common to allude to Hindu law as current in a particular province. Such phraseology is, no doubt, sufficiently accurate for ordinary purposes, for, as a general rule, those resident in a particular locality follow the same shasters; but, nevertheless, it is erroneous in so far as it conveys the notion of a law whose operation is confined to particular localities. There are at this moment numbers of Hindus resident in Calcutta who are governed by the law according to the school of Benares or of Mithila, and it is possible that all five schools of Hindu law may be current, in the sense of being applied, in any one province. Hindu law is personal, and not local. A Hindu may throw it from him altogether by changing his religion, and he may choose to adopt it in any one of its various forms. But so long as a Hindu by birth retains the Hindu religion, he is amenable to Hindu law in one form or other, whether he wishes it or not.

BENGAL SECRETARIAT LIBRARY

SOURCES OF HINDU LAW.

[ACCOUNT BY H. T. COLEBROOKE, ESQ.]

(Strange's Hindu Law, p. 315.)

The laws of the Hindus, civil and religious, are by them believed to be alike founded on revelation, a portion of which has been preserved in the very words revealed, and constitutes the Vedas, esteemed by them as sacred writ. Another portion has been preserved by inspired writers, who had revelation present to their memory, and who have recorded holy precepts, for which a divine sanction is to be presumed. This is termed *smriti*, recollection (remembered law), in contradistinction to *sruti*, audition (revealed law).

The Vedas concern chiefly religion, and contain few passages directly applicable to jurisprudence. The law, civil and criminal, is to be found in the *smriti*, otherwise termed *Dharma Sastra*, inculcating duty, or means of moral merit. So much of this, as relates to religious observances, may be classed, together with ancient and modern rituals, (being the designation of *Calpa or Paddhari*,) as a separate branch; and forensic law is more particularly understood when the *Dharma Sastra* is treated of.

That law is to be sought primarily in the institutes, or collections (*sanhitas*) attributed to holy sages: the true authors, whoever these were, having affixed to their compositions the names of sacred personages such as Menu, Yajnyawalcya, Vishnu, Parasara, Gautama, &c. They are implicitly received by Hindus, as authentic works of those personages. Their number is great: the sages reputed to be the authors being numerous (according to one list, eighteen; according to another, twice as many; according to a third, many more); and several works being ascribed to the same author; his greater or less institutes (Vrihat, or Caghu) or a later work of the author, when old (Vriddha).

The written law, whether it be *sruti* or *smriti*, direct revelation or tradition, is subject to the same rules of interpretation. Those rules are collected in the *Mimansa*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law.

In the eastern part of India, viz., Bengal and Behar, where the Vedas are less read, and the Mimansa less studied than in the south, the dialectic philosophy, or *Nyaya*, is more consulted, and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics.

Hence have arisen two principal sects or schools, which, construing the same text variously, deduce upon some important points of law different inferences from the same maxims of law. They are sub-divided, by farther diversity of doctrine, into several more schools or sects of jurisprudence, which, having adopted for their chief guide a favourite author, have given currency to his doctrine in particular countries, or among distinct Hindu nations: for the whole Hindu people comprise divers tongues; and the manners and opinions, prevalent among them, differ not less than their language.

The school of Benares, the prevailing one in middle India, is chiefly governed by the authority of the *Mitacshara* of *Vijynaneswara*, a commentary on the institutes of Yajygawalcya. It is implicitly followed in the city and province of Benares: so much so, that the ordinary phraseology of references for law-opinions of Pundits, from the Native Judges of Courts established there, previous to the institution of Adawluts superintended by English Judges and Magistrates, required the Pundit, to whom the reference was addressed, to "consult the Mitacshara," and report the exposition of the law there found, applicable to the case propounded.

A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitacshara's* interpretation of the law. It may be sufficient to indicate in this place, the *Viramitrodaya* of *Mitra Misra* and the *Vivadatandava* and other works of *Camalacara.* They do not, so far as is at present recollected, dissent upon any martial question from their great master.

The *Mitacshara* retains much authority likewise in the south and in the west of India. But to that are added, in the peninsula, the *Smriti Chandrica* and other works bearing a similar title (as *Dattaca Chandrica,* &c.) compiled by *Devanda Bhatta,* together with the works of *Madhava Acharya,* and especially the Commentary on *Parasara,* and likewise the writings of *Nunda Pandita,* including his *Vaijayanti* and *Dattaca Mimansa*; and also some writers of less note.

In the west of India, and particularly among the Marahattas, the greatest authority, after the *Mitacshara,* is *Nilacant'ha,* author of the *Vyavahara Mayucha* and of other treatises bearing a similar title.

In the east of India, *Mitacshara,* though not absolutely discarded, is of less authority, having given place to others, which are there preferably followed. In North Behar, or Mithila, the writings of numerous authors, natives of that province, prevail; and their doctrine, sanctioned by the authority of the paramount Raja of the country, is known as that of the Mithila school. The most conspicuous works are the *Vivada Retnacara,* and other compilations under the superintendence of *Chandeswara;* the *Vivada Chintamani,* with other treatises by *Vachespati Misra;* and the *Vivada Chandra,* with a few more.

To these are added, in Bengal, the works of *Jimutavahana* and those of *Raghunandana,* and several others,

constituting a distinct school of law, which deviates on many questions from that of *Mithila*, and still more from those of Benares, and the Dekhin, or southern peninsula.

GRADUAL GROWTH OF HINDU LAW.

(Cowell's Hindu Law, vol. i., p. 13.)

The earlier Rishis delivered their precepts to the entire community. The later commentators addressed themselves to the inhabitants of particular localities, and in the gloss which they respectively put upon the ancient texts of which they treated, they may have been guided by the wishes of the reigning power, or by attention to the usages which had obtained in the particular districts during the lapse of ages. Thus, the authority of the modern commentator, wherever his work was received, came to supersede the reverence due to the earlier sage. The most striking instance of this is afforded by the Yajnavalkya. His Institutes, throughout India, are of the highest and most sacred authority, admitted and recognized everywhere. The Mitacshara is a commentary upon these Institutes less than 1000 years old, composed by a hermit named Vijnyaneswara; and is universally accepted by all the schools, even by that of Bengal, except so far as it is in that school controlled upon various points by what the followers of that school consider to be the superior authority of the work of Jimutavahana. The Mitacshara is perhaps the most celebrated and the most widely authoritative treatise or commentary in existence on the work of the ancient sages. The Dayabhaga, on the other hand, acknowledges equally, with the Mitacshara, the authority of the Institutes of Yajnavalkya; but at the same time its doctrines are upon several essential points in the law both of persons and of property widely different from those of the rival treatise. It is the work of Jimuta-

vahana, who appears to have flourished later than Vijnyaneswara, but earlier than Raghunandana, and who therefore must have composed his work, according to Mr. Colebrooke,* at a date somewhat earlier than the beginning of the sixteenth century.

SCHOOLS OF HINDU LAW.

(Cowell's Hindu Law, vol. i., p. 16.)

Five schools of Hindu law exist at the present day, viz., the Bengal, Mithila, Benares, Maharatta and Dravida schools. The Dayabhaga with its recognized commentaries, the Dayatatwa, and the Dayasangraha, are the peculiar authorities of the school of Bengal. In Mithila, the Vivada Chintamani and other works are especially followed. In the Madras Presidency, the *Mitacshara* and the *Smriti Chandrica* and the *Madhavya;* and in the territories of Bombay, the *Mayukha* and the *Kaustabha* treatises are of leading importance. The *Dattaka Mimansa* and the *Dattaka Chandrica* are the standard authorities on the law of adoption, the latter being preferred in Bengal upon points in which they differ. [The school of Benares is chiefly governed by the Mitakshara, whose authority is fortified by the works of Mitra Misser and Kamalakara, the Viramitrodaya being the most celebrated among them.] Each school has, therefore, the authorities which it adopts as of peculiar and special weight. Books which are thus adopted by one school may be, and are, consulted by the other schools, when they do not contradict the special doctrine of the rival sect. Upon points of Hindu law, which are of general application, the authorities of any school may be indiscriminately cited, so long as they do not contravene the rules of law which have obtained exclusively in a particular province. We have, accordingly,

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* See Steele, pp. 29, 30, 166.

for the sources of the Hindu law, as administered *in Hindu territories*, the old traditional authorities, the authoritative commentators, the approved customs of districts, and, where all these fail, the exposition of law by learned Brahmins, who are the repositories of legal science and religious knowledge.

CHARACTERISTICTS OF THE HINDU COMMUNITY.

(Cowell's Hindu Law, vol. i., p. 6.)

Now, with regard to the community, it remains at the present day what it was at the time of *Menu*, an aggregation of families rather than of individuals. With such a people as to some extent with the inhabitants of modern Russia, co-ownership is the normal condition of the rights of property. Commensality and co-ownership are the characteristics of Hindu family life, and the village community is a political or social expansion of the domestic institution. Individual will and energy are checked by the influences at work in a society by far the largest portion of which rests on a basis of joint responsibility for most of the duties of life, and which sinks the rights of each one in the aggregate claims of the family.

VOID MARRIAGES.

(Gurudass Banerjee on Marriage and Stridhana, pp. 196 to 198.)

The causes which render a marriage void *ab initio* are, first, difference of caste in the contracting parties; and, second, identity of *gotra*, or relationship within the prohibited degrees. In the former case, according to some authorities, if the error is discovered before *garbhadhan*, the girl is to perform expiation, and may be married again; but after *garbhadhan*,

she is no longer eligible for re-marriage, and if of a lower estate, she is liable to be repudiated by her husband, though she is entitled to be maintained, and her issue would be considered illegitimate.* In the latter case, on the error being discovered, the husband is directed to perform penance and repudiate the wife; but he is required to support her.† Her re-marriage, however, is nowhere allowed, even though the repudiation take place before consummation. The doctrine of the Hindu law is that a girl is blemished by the mere ceremony of marriage, and if married again, the reproach of being a twice-married woman (*punarbhu*) would attach to her, even if she be a *virgo intacta*.‡ This is hardly just. Even the virgin widow has one consolation for her hard lot, that it is due to a cause which no human foresight could prevent. But the condition of the repudiated virgin wife, who is condemned to a life of virtual widowhood for the error of a reckless guardian, is truly pitiable. A far more rational rule, and one not wholly against the spirit of our law, would be to allow re-marriage in such cases, where the wife is repudiated before consummation. For here the girl is free from blemish by intercourse; and as for the blemish by reason of the nuptial ceremony, such ceremony being performed under a mistake of fact, may, by a principle not altogether unknown to the Hindu law,§ be regarded in law as not performed at all. Such a rule seems also to receive some support from the decision of the High Court of Bengal in *Anjona Dossee* v. *Proladth Chunder Ghose*,‖ in which the Officiating Chief Justice Norman, in delivering the judgment of the Court upon the question

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* Manu, iii, 5 and 11, Note by Kulluka; Colebrooke's Digest, Bk. v. 339, 340.

† Colebrooke's Digest, Bk. iv, 158—169; Manu, viii, 226, 227.

‡ In the somewhat analogous case of a thing given by mistake, Narada declares that it must be considered as not given.

§ See Colebrooke's Digest, Bk. ii., ch. iv., 53; Narada, iv., 8.

‖ 14 W. R., 403.

whether a suit for declaration of the nullity of a Hindu marriage would lie, observed :—

"If the marriage is in fact no marriage, unless she can obtain a declaration from a Court of Justice that the marriage is null and void, unless she can obtain the protection which such Court can give her, she may be obliged to live with the defendant in a state of concubinage, or at least she will be prevented from marrying any one else. The rights which a decree in this suit may protect—with which the defendant may be restrained from interfering—the preservation of the personal purity of the infant plaintiff and her right and power to contract a valid marriage—are amongst the highest rights which a human being can possess; and it would be a matter deeply to be lamented if the Court had no power to protect and defend them."

Happily, however, in practice the strictness with which relationship and other particulars are enquired into before making the nuptial contract, reduces the evil here complained of within the narrowest possible limits.

(Strange's Hindu Law.)

Where the husband died before consummation, it has been held that his widow is entitled to maintenance only.

EXCLUSION FROM INHERITANCE.

(Cowell's Hindu Law, vol. ii., pp. 184—5.)

The doctrines of the Mitakshara and the Dayabhaga appear to rest upon the same footing with respect to the exclusion of certain persons from all participation in the ancestral estate and from the right of succession by inheritance. The author of the first-mentioned treatise refers to them by way of stating an exception or specified exceptions to the order of succession. He quotes* and explains the text of Yajnavalkya: "An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation." They are debarred from their shares, if their disqualification arose before the division of the property, but one already separated from his co-heirs is not deprived of his allotment.

And again, in the fifth chapter of the Dayabhaga, those persons who are incompetent to inherit are also specified, the purpose of the author being expressed by him to be to make known the competent heirs by means of the exceptions. A text of Apastamba is cited: "All co-heirs who are endued with virtue are entitled to the property." The explanation is given by the same sage,—*viz.*, "A son who diligently performs the obsequies of his father and other ancestors is of approved excellence, even though he be uninitiated; not a son who acts otherwise, be he conversant even with the whole Veda." His connection with the property is declared to be the reward of acts beneficial to his father. The disqualified persons are enumerated by Menu,†—*viz.*, impotent persons, outcasts, persons born blind and deaf, madmen, idiots, dumb,

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* Mitakshara, chap. ii., sec. 10, verse i.

† 9 Menu, p. 201.

and those who have lost a sense or a limb. Food and raiment should be given to them,* except to the outcast and his son begotten after his degradation; but the sons of disqualified persons being free from similar defects shall obtain their father's share of the inheritance.

(Strange's Hindu Law, Mayne's Introduction, p. xxxi.)

The Hindu law, as we have remarked, was in its very essence founded upon the Hindu religion. Hence it followed that an abandonment of the religion, or the loss of its privileges by becoming an outcast, deprived the offender of all the benefits which he would obtain by means of it. Now, however, by reason of the passing of Act XXI. of 1850, it is quite plain that where a particular act entails degradation from caste, that degradation is not in itself a ground of disinheritance. Sometimes, however, it happens that a particular act, which would justify exclusion of caste, is also considered so heinous as to be a ground of disability to inherit even independently of the exclusion. Such a case would not be relieved by the Act just cited. An instance of this occurred in S. A. S. No. 40 of 1858, decided by the Madras Court of Sudder Adawlut. There a party sued for a share of his inheritance. He was met by the objection that he had been previously convicted of attempting to defraud his brother of part of the property, and of a burglary committed in pursuance of that attempt. It was held that this crime was in itself a bar to inheritance under Hindu law, quite independently of any exclusion from caste consequent thereon, and the objection to his suit was upheld.

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* Dayabhaga, chap. iv., verse ii.

(Shama Churn Sircar's Vyavastha Darpana.)

Vyavastha 618.—A person degraded* (fallen) for sin, an outcast, his issue, a hypocrite or a person wearing the token of religious mendicity, one who has assumed another order, an impotent person, one born blind or deaf, one lame, a mad man, an idiot, one dumb, a person afflicted with an incurable or obstinate and agonizing disease, he who has lost the use of a limb, an enemy to his father, a person addicted to vice or expelled from society, are excluded from inheritance.

The heinous crimes are as follow:—

"Killing a Brahmin, drinking forbidden liquor, stealing (gold from a priest), adultery with the wife of a father, natural or spiritual, and associating with such as commit those offences, wise legislators must declare to be crimes in the highest degree." (*Menu*, chap. xi., verse 55.)

The crimes nearly equal to those in the highest degree are as follow:—

"False boasting of a high tribe, maligant information, before the king, of a criminal *(who must suffer death)*, and falsely accusing a spiritual preceptor, are crimes *(in the second degree)* and nearly equal to killing a Brahmin. Forgetting the texts of scripture, showing contempt of the *Veda*, giving false evidence *(without a bad motive)*, killing a friend *(without malice)*, eating things prohibited, or, from their manifest impurity, unfit to be tasted, are six crimes nearly equal to drinking spirits. To appropriate a thing deposited *(or lent for a time)*, a human creature, a horse, precious metals, a field, a diamond or any other gem, is nearly equal to stealing the gold *(of a Brahmin)*. Carnal commerce with sisters by the same mother, with little girls, with women of

* 'Degraded,'—that is, excommunicated for a heinous crime, or for crimes in the second or third degree. (See Colebrooke's Digest, vol. iii., p. 304.)

Degradation takes place in the case of a heinous crime once consciously or twice unconsciously committed.

the lowest mixed class, or with wives of a friend, or of a son, the wise must consider as nearly equal to a violation of the paternal bed. (*Menu*, chap. xi., verses 56—59.)

These crimes—whether perpetrated consciously or unconsciously—cause degradation generally by the commission (of any of them) more than once. *Vide Prayashchitta-tattwa* and *Prayashchitta-Vivek.*

A sinner in the third degree is only excluded from participation in the case of repeated offences: (*such*) crimes are therefore mentioned in the plural number. (*Colebrooke's Digest*, vol. iii., p. 304.)

The crimes in the third degree are as follow:—

Slaying a bull or cow, sacrificing what ought not to be sacrificed, adultery, selling one's-self, deserting a preceptor, a mother, a father, or a son, omitting to read the scripture, and neglect of the fires *prescribed by the Dharmashastra only*;—the marriage of a younger brother before the elder, and that elder's omission to marry before the younger, giving a daughter to either of them, and officiating at their nuptial sacrifice;—defiling a damsel, usury, want of perfect chastity in a student, selling a holy pool or garden, a wife, or a child;—omitting the sacred investiture, abandoning a kinsman, teaching the *Veda* for hire, learning it from a hired teacher, selling commodities that ought not to be sold;—working in mines of any sort, engaging in *dykes, bridges*, or *other* great mechanical works, spoiling medicinal plants (repeatedly), subsisting by the *harlotry of* a wife, offering sacrifices and preparing charms to destroy (the innocent);—cutting down green trees for firewood, performing holy rites with a selfish view merely, and eating prohibited food (once without previous design);—neglecting to keep up the consecrated fire, stealing *any valuable thing besides gold*, non-payment (*of the three*) debts, application to the books of a false religion, and excessive attention to music or dancing;—

stealing grain, base metals, or cattle, familiarity *(by the twice-born)* with women who have drunk inebriating liquor, killing without malice a woman, a *Shúdra, Voishya,* or a *Kshatriya,* and denying a future state of rewards and punishments, are all crimes in the third degree (but higher or lower according to circumstances).—(*Menu,* chap. xi., verses 60—67.)

FUNDAMENTAL PROPOSITIONS OF THE DOCTRINE OF CAKES.

(Krishna Kamal Bhattacharya on some Unsettled Questions of Succession under the Bengal School of Hindu Law, preface.)

1. A male person offers cakes to his father, grandfather, and great-grandfather in the paternal line, and also to his mother's father, grandfather and great-grandfather in the maternal line.

2. A is said to be sapinda to B if he gives pinda or cakes to B, if he receives cakes from B, or if both A and B give cakes to a common ancestor C.

Rules laid down by Dwarka Nath Mitter.

1. Among sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes are of superior religious efficacy in comparison with the second.

2. Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description.

3. Where the number of such cakes is equal, those that are offered to nearer ancestors are preferred to those offered to more distant ones.

TABLE OF SAPINDAS SHOWING THE AMOUNT OF SPIRITUAL BENEFIT CONFERRED BY EACH.

(Krishna Kamal Bhattacharya on some Unsettled Questions of Succession under the Bengal School of Hindu Law, Appendix I.)

N.B.—Pindas or cakes may be characterized as of three kinds. When A gives pinda directly to B, as a son to his father, grandson to his grandfather, &c., there the pinda may be said to be a direct one; when A only shares with another ancestor pindas given by a third to that ancestor, there the pindas may be said to be shared by A; for example, A shares pindas given by his brother to his father.

Pindas are called secondary, when they are given to the maternal ancestors of the giver.

IMMEDIATE SAPINDAS.

1. Son gives 1 pinda direct, and 2 shared.
2. Grandson 1 „ „ 1 „
3. Great-grandson 1 „ „ none „
4. Daughter's son 1 direct, but secondary, and 2 shared, but secondary.
5. Son's daughter's son, 1 direct secondary, 1 shared secondary.
6. Grandson's daughter's son, 1 ditto. none ditto.

SAPINDAS ON THE FATHER'S SIDE.

1. Father	none direct,	2	shared.
2. Brother	... ditto	3	ditto.
3. Brother's son	... ditto	2	ditto.
4. Brother's son's son	... ditto	1	ditto.
5. Father's daughter's son	... ditto	3	ditto secondary.
6. Brother's daughter's son	... ditto	2	ditto ditto.

7.	Brother's son's daughter's son	ditto	1	shared secondary.
8.	Grandfather ...	ditto	1	ditto ditto.
9.	Father's brother ...	ditto	2	ditto ditto.
10.	Father's brother's son ...	ditto	2	ditto ditto.
11.	Father's brother's son's son...	ditto	1	ditto ditto.
12.	Grandfather's daughter's son	ditto	2	ditto ditto.
13.	Father's brother's daughter's son ...	ditto	2	ditto ditto.
14.	Father's brother's son's daughter's son ...	ditto	1	ditto ditto.
15.	Great-grandfather ...	ditto	none shared.	
16.	Grandfather's brother ...	ditto	1	shared.
17.	Grandfather's brother's son	ditto	1	ditto.
18.	Grandfather's brother's son's son	ditto	1	ditto.
19.	Great-grandfather's daughter's son ...	ditto	1	ditto secondary.
20.	Grandfather's brother's daughter's son ...	ditto	1	ditto ditto.
21.	Grandfather's brother's son's daughter's son ...	ditto	1	ditto ditto.

As regards sapindas on the mother's side, none of the pindas given by them are shared by the last owner; in their case, the consideration is, how many pindas given by them are such as the deceased would have given on his own part. Therefore, against the name of each sapinda, we place a figure to indicate the number of persons who are the common recipients from that particular sapinda and the deceased.

SAPINDAS ON THE MOTHER'S SIDE.

1.	Mother's father	2	pindas that deceased would give.
2.	Mother's brother ...	3	
3.	Mother's brother's son ...	2	

4. Mother's brother's son's son ...	1	
5. Mother's sister's son ...	3	secondary.
6. Maternal uncle's daughter's son	2	ditto.
7. Maternal uncle's son's daughter's son ...	1	secondary.
8. Mother's grandfather ...	1	pinda given by the deceased.
9. Mother's father's brother ...	2	
10. Mother's father's brother's son ...	2	given by the deceased.
11. Mother's father's brother's son's son ...	1	ditto.
12. Mother's grandfather's daughter's son ...	2	secondary.
13. Mother's father's brother's daughter's son ...	2	ditto.
14. Mother's father's brother's son's daughter's son ...	1	ditto.
15. Mother's great-grandfather ...	None; but receives a pinda and is therefore a sapinda.	
16. Mother's grandfather's brother gives ...	1	pinda given by the deceased.
17. Mother's grandfather's brother's son ...	1	
18. Mother's grandfather's brother's son's son ...	1	
19. Mother's great-grandfather's daughter's son ...	1	secondary.
20. Mother's grandfather's brother's daughter's son ...	1	ditto.
21. Mother's grandfather's son's daughter's son ...	1	ditto.

The definition of a sapinda may be stated in three separate propositions.

I. A is sapinda to B, if A gives pinda to B.
II. A is sapinda to B, if A receives pinda from B.
III. A is sapinda to B, if both give pinda to a common ancestor C.

All the immediate sapindas become so, in accordance with the Proposition I.

Nos. 1, 8, and 15 out of the sapindas on both the father's side, and the mother's side, become so, in accordance with the Proposition II.

All the rest of the sapindas on both the father's and the mother's side acquire that relationship, by virtue of the Proposition III.

TABLE OF SUCCESSION IN ACCORDANCE WITH THE RULES LAID DOWN BY MR. JUSTICE DWARKA NAUTH MITTER IN THE CASE OF GURU GOBINDO SHAHA, 13 W. R. F. B. 49.

1. Son.
2. Grandson.
3. Great-grandson.
4. Widow.
5. Unmarried daughter.
6. Married daughter, having or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Re-united whole brother.
11. Un-re-united whole brother and re-united half-brother together.
12. Un-re-united half-brother.

13. Brother's son.
14. Brother's son's son.†
15. Father's daughter's son, or the son of a sister, whole or half.
16. Son's daughter's son.
17. Brother's daughter's son.
18. Son's son's daughter's son.
19. Brother's son's daughter's son, whether the brother be whole or half.
20. Grandfather.
21. Grandmother.
22. Father's whole brother.‡
23. Father's half-brother.
24. Father's whole brother's son.
25. Father's half-brother's son.
26. Father's whole brother's son's son.
27. Father's half-brother's son's son.
28. Grandfather's daughter's son, whether it be the whole or half sister of the father.
29. Father's brother's daughter's son, whether the whole or half.
30. Father's brother's son's daughter's son, whether the brother be whole or half.
31. Great-grandfather.
32. Great-grandmother.

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* The internal arrangement as among the different kinds of brother's sons is as follows:—
(*a*) Re-united whole brother's son.
(*b*) Un-re-united half-brother's son and re-united whole brother's son together.
(*c*) Un-re-united half-brother's son.

† The internal arrangement as among different kinds of brother's son's sons is as follows:—
(*a*) Whole brother's son's son.
(*b*) Half-brother's son's son.

‡ As among father's brothers also, the rule determining the preferential right on the ground of re-union is to be applied, as in the case of one's own brethren.

33. Grandfather's whole brother.
34. Grandfather's half-brother.
35. Grandfather's whole brother's son.
36. Grandfather's half-brother's son.
37. Grandfather's whole brother's son's son.
38. Grandfather's half-brother's son's son.
39. Grandfather's sister's son, whether the sister be whole or half.
40. Grandfather's brother's daughter's son, whether the brother be whole or half.
41. Grandfather's brother's son's daughter's son, whether the brother be whole or half.
42. Mother's father, or maternal grandfather.
43. Mother's brother, whole or half, or maternal uncle.
44. Maternal uncle's son.
45. Maternal uncle's son's son.
46. Mother's sister's son, whether the sister be whole or half.
47. Mother's brother's daughter's son, whether the brother be whole or half.
48. Mother's brother's son's daughter's son, whether the brother be whole or half.
49. Mother's father's father.
50. Mother's father's brother, whole or half.
51. Mother's father's brother's son, whole or half.
52. Mother's father's brother's son's son, whole or half.
53. Mother's father's sister's son, whether the sister be whole or half.
54. Mother's father's brother's daughter's son.
55. Mother's father's brother's son's daughter's son.
56. Mother's great-grandfather.
57. Mother's grandfather's brother, whole or half.
58. Mother's grandfather's brother's son, whole or half.
59. Mother's grandfather's brother's son's son, whole or half.
60. Mother's grandfather's sister's son, whole or half.
61. Mother's grandfather's brother's daughter's son.

62. Mother's grandfather's brother's son's daughter's son.

Then come Sakulyas, as follows—

63. Great-grandson's son.

64. Great-grandson's son's son.

65. Great-grandson's great-grandson.

66. Great-grandfather's father,

67. Descendants of No. 66 in the male line as far as the sixth degree; the degrees are to be counted excluding himself. Then such of the descendants of No. 66 in the female line, as offer pinda to him.

68. Then great-grandfather's grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

69. Great-grandfather's great-grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

Then the Samanodakas, viz.:—

70. The seventh ancestor from the deceased, counting his father as one.

71. Then the descendants of No. 70 in the male line and such descendants of the daughter's son kind, as offer pinda to No. 70.

So on as far as relationship with the deceased can be traced.

N.B.—The Sakulya relationship extends as far as the sixth degree of ascent or descent.

See Dáyabhága, ch. xi., s. vi., para. 21.

The Samanodaka relationship extends so far as common descent can be traced. See Vrihanmanu quoted in the Mitákshará, ch. ii., s. v., para. 6.

Lastly come the specified strangers.

SAPINDAS AND SAKULYAS AND SAMANODAKAS.

(Shama Churn Sircar's Vyavastha Darpana, see Vyavasthas 127 and 134.)

The distant kinsman (*Sakulya*) is one who shares the divided oblation. The paternal great-grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his son by a woman of the same tribe, his grandson and great-grandson: all these, partaking of undivided oblations, are pronounced '*Sapindas*.' Those who share divided oblations are called '*Sakulyas*.' "Male issue of the body being left, the property must go to them. On failure of *Sapindas*, or near kindred, *Sakulyas*, or remote kinsmen, are heirs. If there be none, the preceptor, the pupil, or the priest, will take the inheritance. In default of all these, the king" (has the escheat).—Boudhayana. The meaning of the passage is this: since (the fourth person or the proprietor) enjoys the oblation-cakes presented to the father and the two next ancestors, as being the participator in the offerings at obsequies: and since the son and other descendants, to the number of three, present oblations to the deceased; and he, who, while living, presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person; therefore, such being the case, the middle most (of seven) who, while living, offered food to the manes of ancestors, and, when dead, partook of the offerings made to them, became the object to which the oblations of his descendants were addressed in their life-time, and shares with them, when they deceased, the food which must be offered by the daughter's son, and other (surviving descendants beyond the third degree). Hence those (ancestors) to whom he presented oblations, and those (descendants) who present oblations to him, partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who do partake of such offerings are *Sapindas*. But one distant in the fifth degree neither gives an oblation to the fifth in ascent, nor shares

the offering presented to his manes. So the fifth in descent neither gives oblations to the middle person who is distant from him in the fifth degree, nor partakes of the offerings made to him: Therefore three ancestors, from the grandfather's grandfather upwards, and three descendants from the grandson's grandson downwards, are denominated "*Sakulyas*," as partaking of divided oblations, since they do not participate in the same offering. This relation of *Sapindas*, as well as that of *Sakulyas*, has been pronounced relatively to inheritance.* Thus *Sakulya* is of two kinds: (1) descending, and (2) ascending. The descending *Sakulya* is the great-grandson's son and the rest down to the third degree in the descending line. The ascending *Sakulya* intends the great-great-grandfather, and other ancestors up to the third degree in the ascending line.†

The fourth person and the (two) rest share the *lepa* or the remains of the oblations wiped off with *kusha* grass; the father and the (two) rest share the oblation cakes; the seventh person is the giver of oblations; the relation of *Sapinda*, or men connected by the oblation-cake, extends therefore to the seventh person (or sixth degree of ascent or descent). It should, however, be noticed that these are considered *Sapindas* only in the case of impurity by reason of of a kinsman's death; but in respect of inheritance, (the first) three are as *Sapindas*, (the other) three as *Sakulyas*.—See Cole. Dig., vol. iii., p. 531.

Samanodakas are kinsmen allied by common libation of water.

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* *Dá. bhá.*, p. 171.
† *Dá. Kra. Sang.*, p. 25.

TABLE OF THE ORDERS OF SUCCESSION TO THE DIVERSE DESCRIPTIONS OF STRIDHAN.

(Shama Churn Sicar's Vyavastha Darpana, p. 822.)

ORDER OF SUCCESSION TO THE PECULIUM OF AN UNMARRIED DAUGHTER.

1. THE WHOLE BROTHER. 2. THE MOTHER. 3. THE FATHER.

Failing these, her parent's relations, as they happen to be, succeed according to the order of succession to a childless woman's property, *q. v.*

To a betrothed girl's property given by her to her husband,—First, the husband succeeds; in his default, the above-mentioned heirs succeed according to the above order.

ORDER OF SUCCESSION TO THE STRIDHAN OF A MARRIED WOMAN HAVING CHILDREN.

To her property received at the time of her nuptials :—

1. The unmarried daughter not betrothed,
2. The betrothed daughter,
3. The daughter who has a son, / The daughter likely to have a son,
4. The barren daughter, / The (sonless) widowed one,
5. Son,
6. Daughter's son,
7. Son's son,
8. Son's grandson in the male line,
9. The son of a rival wife,
10. Her son's son,
11. Her son's grandson in the male line.

To that received at any time other than that of her nuptials :—

1. Son, / Unmarried daughter,
2. The daughter having a son, / The daughter likely to have a son,
3. Son's son,
4. Daughter's son,
5. Son's grandson in the male line,
6. The son of a rival wife,
7. Her son's son,
8. Her son's grandson in the male line,
9. The barren daughter, / The (sonless) widowed daughter.

To that given by her father :—

1. The unmarried daughter,
2. Son,
3. The daughter having a son, / The daughter likely to have son,
4. Daughter's son,
5. Son's son,
6. Son's grandson in the male line,
7. The son of a rival wife,
8. Her son's son,
9. Her son's grandson in the male line,
10. The barren daughter, / The sonless widowed daughter.

ORDER OF SUCCESSION TO A CHILDLESS MARRIED WOMAN'S STRIDHAN.

Given by her parents before marriage, her fee or gratuity, or bestowed after marriage:—	*Other than that given by her parents, before marriage, her fee or gratuity, or bestowed after marriage.*	
	If married according to the Brahma, Daiva, Arsha, Prajapatya, or Gandharva form:—	*If married according to the Asura, Rákshasha, or Poishacha form:—*
1. The whole brother,	1. The husband,	1. The mother,
2. The mother,	2. The brother,	2. The father,
3. The father,	3. The mother,	3. The brother,
4. The husband.	4. The father.	4. The husband.

SUCCESSION OF HEIRS AFTER THOSE AFORESAID TO ANY DESCRIPTION OF PROPERTY OF A WOMAN MARRIED ACCORDING TO ANY OF THE EIGHT FORMS.

5. Husband's younger brother,	8. Her husband's sister's son,	12. The *Sakulyas*,
6. The sons of the husband's younger and elder brothers,	9. Her own brother's son,	13. *Samanodakas*,
7. Her sister's son.	10. Her son-in-law,	14. *Samana-gotras*,
	11. The *Sapindas*.	15. *Samana-pravaras*.

EXAMINATION QUESTIONS
WITH
APPROPRIATE ANSWERS.

(Currie's Law Examination Manual, pp. 1 to 23.)

1. Q. (*a*) On what are the laws of the Hindus, civil and religious, believed by them to be founded. (*b*) On what do the rules of law which at the present day govern the lives and property of Hindus depend. (*c*) To whom does the Hindu law apply. (*d*) And under what circumstances does a man cease to be amenable to it ?

A. (*a*) On revelation, a portion of which has been preserved in the very words revealed, and constitutes the *Vedas*, esteemed by them as *Sacred Writ.* Another portion has been preserved by inspired writers, who had revelations present to their memory, and who have recorded the holy precepts for which a divine sanction is to be presumed. This is termed *smriti*, recollection (remembered law), in contradistinction to *sruti*, audition (revealed law). (*b*) They depend partly upon the doctrines received by the various schools of interpretation of the sacred text, and partly upon the usages which have obtained in particular classes or localities, and are adapted to existing habits and customs, subject to such modifications, changes, and improvements, as have been, from time to time, introduced during the last century by the action of the English Legislature and the decisions of English Courts. (*c*) The Hindu law has obligatory force *only* upon those who are Hindus both by birth and by religion. (*d*) When a Hindu changes his religion, and shows, by his course

of conduct after such change, what rules and customs he has adopted, he is released from the Hindu law, and thenceforth governed by the law and usage of the class with which he has associated himself. (Abraham *v.* Abraham, 9 Moore's Indian Appeals, 227.)

2. Q. (*a*) Is the Hindu law a personal or a local law? (*b*) Has a Hindu a freedom of choice as to the particular "*shaster*" by which he will be governed? (*c*) Can he import into any country to which he migrates the particular law of his own tribe? (*d*) And what is the presumption of law as to his having retained or changed the "*shasters*" of his birth?

A. (*a*) A personal, not a local law; (*b*) yes; (*c*) yes; (*d*) the governing circumstance to be attended to in deciding by what law he is bound, being the intention, as manifested by the character of the purohit, ceremonies and usages which he, or his descendants after him, retain about him. The real test to be applied is, by what "*shasters*" the customs and rites of marriages and funerals are conducted. Occasional and daily religious services may be changed without effecting a corresponding change in a Hindu's legal liabilities. (Koomudchunder Roy *v.* Seetakant Roy, Suth. F. B. 75; Ranee Pudmavati *v.* Baboo Doolar Singh, 7 S. W. R., P. C., 41; Cowell's Hindu Law, vol. i., pp. 3 to 6.)

3. Q. What are the chief characteristics of the Hindu community at the present day?

A. An aggregation of families rather than of individuals. Communality and co-ownership, and its divisions into four great *castes*, parcelled out by reference to the principles of (1) Religion, (2) War, (3) Industry, (4) Servitude. (Cowell's Hindu Law, vol. i., pp. 6 to 8.)

4. Q. How many schools of law exist at the present day? Name them.

A. Five: (1) Bengal, (2) Mithila, (3) Benares, (4) Maharashtra, and (5) Dravida.

5. Q. What are the authorities followed by the respective schools?

(1) The *Dayabhaga* with its recognized commentaries, the *Dayatatwa*, and the *Dayasangraha*, are the peculiar authorities of the school of Bengal. (2) In Mithila, the Vivada Chintamoni and other works are especially followed. (3) The school of Benares is chiefly governed by the Mitakshara, whose authority is fortified by the works of Mitra Misser and Camalakara, the Viramitrodaya being the most celebrated amongst them. (4) The Parasara Madhaviya is the principal authority in the Dravida school. (5) The Mayukha is the standard work followed by the Maharashtra school.*

6. Q. What are the sources of the Hindu law as administered in Hindu territories?

A. (1) The old traditional authorities; (2) the authoritative commentators; (3) the approved customs of the districts; and (4) (where all these fail), the exposition of law by learned Brahmins. (Cowell's Hindu Law, vol. i., p. 17.)

7. Q. How are the members of a "gotra," or family, connected?

A. By blood-relationship, marriage, or adoption. (Cowell's Hindu Law, vol. i., p. 57.)

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* In Western India, in questions of inheritance, the first place is assigned to the Mitakshara, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the Shastris of the courts and oral statements of persons learned in the Hindu law of this Presidency.—12, Bombay High Court Reports, p. 65.

8. Q. Who is the "Guru" and who the "Purohit"? And what are their respective functions?

A. The "*Guru*" is the spiritual guide of the family. He is a man's *Guru*, who, after going through the ritual, imparts to him the Veda. (1 Yajnavalkya 34.) And the "*Purohit*," the priest who officiates at and presides over the performance of the religious ceremony. The former wield both a temporal and spiritual authority. They can expel a man from *caste*, or restore him: their benediction is equivalent to the remission of sins. The latter conduct worship and all ceremonies; assign names to new-born infants, and calculate their nativity; bless new houses, wells, and tanks; purify and consecrate temples; and conduct marriages and funeral ceremonies. (Cowell's Hindu Law, vol. i., pp. 60 and 61.)

9. Q. What is the doctrine as to the payment of "Purohit's" fees?

A. The amount of the priest's fee is left to the conscience and the means of the person for whom his functions are performed, but the payment of some fee is essential to the efficacy of the ceremonies performed. (11, Bombay High Court Reports, p. 10.)

10. Q. What is the ordinary method of providing for the support of idols, priests, and worship? Is this method recognized?

A. By endowment. Property so dedicated is known as *dewuttur* property. Such endowments are recognized, so long as they appear to have been *bonâ fide* real, not nominal, endowments,—the criterion being publicity of the dedication or grant and the appropriation of the rents, issues, and profits to the purposes for which the grant purported to have been made. (Cowell's Hindu Law, vol. i., p. 66.)

11. Q. How many descriptions of "muths" or temples are there? and how does the office of "mohunt" devolve in each case?

A. Three. (1) *Mouroosi*, (2) *Punchaite*, and (3) *Hakimi*. In the first, the office is hereditary; in the second, elective; and in the third, vested in the ruling power, or in the party who endowed the temple. (Cowell's Hindu Law, vol. i., p. 70.)

12. Q. In what does the "*shraddha*," or funeral obsequy, consist? And what is the object of its performance?

A. These obsequies consist of oblations of food and libations of water offered to the manes of the Hindu's ancestors. The object in view is to effect, by means of oblations, the re-embodying of the soul of the deceased after burning his corpse. (Cowell's Hindu Law, vol. i., pp. 71—80.)

13. Q. Define "*stridhana*," and give its derivation.

A. From *stri*, female, and *dhana*, wealth. The separate property of a married woman, including gifts from her husband, his relations or her own, or any other acquisition. (Mac. H. L. 96, 109; Dayabhaga, chap. iv., s. i., v. 4; Cow. H. L., vol. i., 84.) What has been given [to a woman] by her father, her mother, her husband, or her brother, or received by her before the nuptial fire, or on occasion of her husband's marriage with another wife, and such like, is called *stridhana*. (Dhar. Sast. Yagn., sloka 143.)

14. Q. State the different descriptions of *stridhana* in the Bengal, Madras, Bombay, and Mithila schools.

A. They are the same in all four schools. The most comprehensive definition is given in the following text of Menu:—

(1) What was given before the nuptial fire; (2) what was presented on the bridal procession; (3) what was given in token of love; and (4) what was received from a mother, a brother, or a father. (Mac. H. L. 41, 1870.)

15. Q. In the Bengal school does land given to a woman by her husband form part of her *stridhana?*

A. Yes; but she cannot alienate it. (Cowell's Hindu Law, vol. i., p. 84.)

16. Q. Can the wife alienate her *stridhana* during her coverture?

A. Over her *stridhana* generally the wife has sole power. She can alienate it during coverture. (Cowell's Hindu Law, vol. i., p. 84; vol. ii., p. 32.)

17. Q. Is the property which a married woman inherits from her husband on his death without male issue part of her *stridhana?* What is the nature of her interest in it?

A. No; she does not attain a full proprietary right of inheritance, but is only entitled to enjoy the estate under the guardianship of the next heirs of the deceased. A widow can only enjoy the estate subject to the control of her guardians. (Cowell's Hindu Law, vol. i., p. 193.)

18. Q. Illustrate the doctrine of "*factum valet quod fieri non debuit,*" and state to which of the schools it applies.

A. This doctrine is founded on a passage in the Dayabhaga, which says, "Slay not a Brahmin;" but if a man should kill one, the murder is committed, and it cannot be undone. Equity, however, requires that the dependants of the slain man be compensated. Similarly, if a Hindu in

Bengal should give away to a stranger all his property, he commits a sinful act; but the gift, being made, cannot be revoked. This maxim applies to the Bengal school only. A Hindu in Bengal may leave by will, or alienate in his lifetime, his possessions, whether inherited or acquired; and a gift or legacy, whether to a son or stranger, will hold good, however reprehensible it may be as a breach of an injunction and precept. (Cowell's Hindu Law, vol. i., p. 97.) The Bengal law simply lays down, "That the thing is done; it cannot be undone." *Factum est illud; fieri infectum non potest; i.e.*, if a man makes a *bonâ fide* gift complete in every respect to a stranger, it is lawful, though morally reprehensible. (3 L. M. R. 260.)

19. Q. Name the different species of marriage.

A. (1) Brahma; (2) Daiva; (3) Arsha; (4) Prajapatya; (5) Asura; (6) Gandharba, or love marriages; (7) Rakshasa, or forcible connection; and (8) Paisacha, where the marriage has been effected by fraud. The four first are peculiar to Brahmins; the fifth form is peculiar to Vaisyas and Sudras. (Mac. H. L. 62; Cow. H. L., vol. i., 164.)

20. Q. By what Act is the degradation of caste as a disqualification for inheritance abolished? And mention the Act which authorizes the re-marriage of widows, and state the provisions of the section.

A. (1) Act XXI. 1850; (2) Act XV. 1856, which says: "No marriage contracted with Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding. (section 1.)

21. Q. On what is the Hindu law of adoption based?

A. On the spiritual necessities of the Hindu, the primary object being to save from *Put*, or hell. The spiritual efficacy of the possession of a son, which in the remote ages was the paramount idea, has somewhat given place to the feeling that the existence of a son is desirable, because it renders the continued performance of rites during the long period for which they are enjoined more secure, and because, to ensure the continuance of his name and family, is an object always dear to the mind of a Hindu. (Mac. H. L. 31; Cow. H. L., vol. i., 210.)

22. Q. Mention the different descriptions of property known to Hindu law.

A. (1) Into things personal, and (2) real, *i. e.*, things moveable and immoveable; (3) ancestral; and (4) self-acquired.

23. Q. Explain "Dwyamushayana," "Dattaka," "Kritrima," "Putra," "Patrica Putra."

A. (1) A child adopted after the ceremony of tonsure has been performed becomes a Dwyamushayana, or child of two fathers. The absolute transfer being regarded as incapable of taking effect, such a child belongs to both families, inherits in both, and performs the obsequies in both. No one but the natural parents can give a child in adoption. The essential element in this species of adoption is an agreement, expressed or implied, between the natural and adoptive fathers, to this effect: "This is a son of both us." The adopted son still continues a member of his own family, and partakes of the estate of his natural and adopting father. (Cow. H. L., vol. i., 243, 302, 341; Mac. H. L. 74.) (2) The Dattaka Mimansa and the Dattaka Chandrika are the standard authorities on the law of adoption. Anitya Datta is the name given to a son adopted in the Dattaka, from a

different Gotra, after he has received the tonsure in his natural Gotra. Dattaka, then, is a form of adoption, or son given. When this form is completed, it can never be revoked. (Cow. H. L., vol. i., 16, 271, 342; Mac. H. L. 67.) (3) Kritrima, a form of adoption obtaining in the Mithila country, an innovation upon the established Dattaka form. The origin of the practice of this form of adoption is traceable to the prohibitory rule of *Vachespati*, that a woman could not, even with the previously obtained consent of her husband, adopt a son after his death in the Dattaka form. Colebrooke assigns its introduction to two pundits, whose motive was to save a confusion of families and names. To this form the only parties are the adopter and the adopted, and if he has attained his majority the assent of the adopted is essential. Such consent must be given in the life of the adopter. Equality of caste is the only condition of eligibility for a Kritrima adoption. (Cow. H. L., vol. i., 244, 261, 268, 299, 319, 321; Mac. H. L. 95; 5 Cole. Dig., iv. 10; 1 Marshall, p. 95.) (4) Putra, a son. "Since the son (trayate) delivers his father from the hell named *Put*, he was therefore called Putra by Brahma himself. (Mac. H. L. 63; Menu, ix. 138.) (5) Patrica Putra is the appointed daughter; and her son is equal to a son whom a man has begotten on his wedded wife of equal class. The term Patrica Putra includes four persons; viz.—(*a*) the appointed daughter; (*b*) her son; (*c*) her son when she was given in marriage with an express stipulation that her son should belong to her father; and (*d*) a Dwyamushyana. (Cowell's Hindu Law, vol. i., p. 212.)

231. Q. Who is said to be an "*aurasa*" son?

A. An "*aurasa*" son is one born of a *dharma* wife. *Aurasa* is from *uras* "the best," being the first in order of sons. *Dharma* is a wife of the same caste as her husband, and wedded to him according to the *Brahma* and other improved forms of marriage (Dhar. Sast. Yagn., sloka 128 and notes).

24. Q. Define a "vested remainder" under the Hindu law.

A. A remainder to be vested under the law must be vested in interest. Hindu law knows nothing of a "vested estate" with a contingent interest. The Hindu law meaning of the word "vest," as applied to inheritance or estate, means the acquisition of an actual estate. Since under that law the estate cannot be carved out into parts or divisions by the creation of particular "estates" (in the English law sense of the term), a remainder after an estate-tail, or other "limited inheritance," is not vested in law—it is contingent. A remainder must be vested in interest and possession in contemplation of law; enjoyment may be deferred, but possession is immediate in contemplation of law; ownership according to Hindu law is entire and unconditional, and not susceptible of small divisions and of portions. There is no difference between an estate vested in fee either in whole or in part, and an estate vested in interest. In other words, "vested" is equivalent to unconditional. Hindu law does not countenance conditional gifts "as vested subject to be divested." (3 M. L. R. 259.)

25. Q. Explain "Nitya Dwyamushyana," and "Anitya Dwyamushyana," and state the broad distinctions between them?

A. The latter is distinguished from the former in that the former is incompletely son of two fathers, the latter absolutely son of two fathers. The broad distinction between them is, that the issue of the former belongs to the adoptive, and of the latter to the natural, family. (Cow. H. L., vol. i., 341, 342; Mac. H. L. 74.)

26. Q. What is the right of the parents with respect to giving a son in Dattaka adoption?

A. According to Menu, a father has absolute power to give, the mother only being able to do so with her husband's con-

sent (9 Menu, verse 168). Besides this authority for the father's absolute power, there is the direct authority of the Dattaka Mimansa (sec. ix. verse 13), and the absence of any prohibition in the Dattaka Chandrika.

27. Q. What is the law under the Dayabhaga, and what under the Mitakshara, as to the power of a widow to adopt to her husband without his authority? Can the want of authority be supplied in any and what Presidencies and how?

A. The three rules which embrace the whole law on the subject are: (1) That the husband's permission is always a sufficient authority to his widow to enable her to adopt, except in Mithila, where the Dattaka form has in practice been abolished. (2) That such permission in Bengal is essential, and cannot be dispensed with under any circumstances. (3) That by the followers of the Mitakshara, both in the Benares and the Mharashtra schools, the consent of the husband's kindred may be substituted when the husband has expressed no prohibition, and has merely failed or omitted to give his sanction. (Cow. H. L., vol. i., 262; Mac. H. L. 85.)

28. Q. What is the present state of the law in Bengal, Madras, and Bombay as to the legality of an adoption of an only or eldest son?

A. The eldest son, as well the only son, cannot be given in adoption.

29. Q. What is the law with regard to the right of illegitimate sons to maintenance among,—(*a*) the three regenerate classes; (*b*) Soodras?

A. The illegitimate son, even of a man of the three regenerate tribes, is entitled to maintenance. (Mutuswamy

Tagavera Yettappa Naiken *v.* Venkataswarra Yettappa, 2 B. L. R. P. C. 15; Cow. H. L., vol. i., 136.) An illegitimate son born of a low woman has a right to maintenance. (Inderpan Valumgpatty Taver *v.* Ramasawmy Pandia Talser, 3 B. L. R. P. C. 4.) It is provided by law that the son by a Soodra woman of a man belonging to any of the three superior classes is entitled to maintenance. The same rules that apply to illegitimate children by Soodra women are applicable also to the spurious offspring of women in the inverse order of the classes. (Cowell's Hindu Law, vol. i., p. 171.)

30. Q. What effect has the want of chastity on the right to maintenance of,—(*a*) a married woman; (*b*) a widow?

A. The adulterous wife must be maintained. (Cole. Dig. B. ii. c. iv. s. 2, verse 18.) But a woman divorced for adultery during her husband's life, and in unchastity after his death, is not entitled to maintenance after his death. (Cowell's Hindu Law, vol. i., pp. 135, 170.) See also answer to questions 32, 35, *post.*

31. Q. What power has a wife to bind her husband by her contracts?

A. The wife's power to pledge her husband's credit, or to render him liable on her contracts on the ground of an implied agency, is the same in Hindu as is English law. (Cowell's Hindu Law, vol. i., p. 166.)

32. Q. What is the widow's right to maintenance? Is it superior or not to the right of partition and alienation?

A. Under *Mitakshara* law a Hindu widow's maintenance is a charge upon the whole estate in which her husband had a share, and therefore upon every part thereof. (4 Bo. H. C. R. 273.) It is superior to the right of partition, also of alienation. The widow's maintenance is also, according to

the Bengal school, a charge upon the estate of her husband. (Cow. H. L., vol. i., 138.) A wife is, under the Hindu Law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance. Where, therefore, a husband in his life-time made a gift of his entire estate, leaving his widow without maintenance, it was *held* that the donee took and held such estate subject to her maintenance. (I. L. R., 2 All. 315.)

33. Q. Who are the widow's legal guardians? and what is her obligation to reside with her guardians?

A. The members of her husband's family; and she forfeits her claim to maintenance by withdrawing herself from their protection. But if less than her proper amount is afforded to her, and she seeks shelter under the roof of her parents, this has been held not to forfeit her right to maintenance (Cowell's Hindu Law, vol. i., p. 138.)

34. Q. What is the widow's remedy for enforcing her right to maintenance?

A. According to the Bengal school, the ancestor's widow can follow the estate with her claim for maintenance out of it, and further there is the text of Katyayana:—"Except his whole estate and dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable; otherwise it may not be given." A Hindu widow can insist upon remaining in the family dwelling-house, and can also insist upon being maintained out of the joint estate, into whosesoever hands that dwelling-house and estate may pass, unless when they are sold expressly to provide for the widow. (Cowell's Hindu Law, vol. i., p. 141.)

35. Q. What is the wife's right to maintenance?

A. The wife is entitled to maintenance. It has been held that a wife leaving her husband's house without sufficient cause, and especially if *she be an adulteress*, cannot claim maintenance. (Ilata Shavata *v.* Ilata Narayavan Nambri Divri, 1 Madras, 372.) She does not by a single act of disobedience, or even by leaving her husband's house and carrying on an independent calling, forfeit for ever her rights to maintenance. If she be ready to return to him, he is bound to maintain her. While apart from him, and unwilling to return, she is not entitled to be maintained by him. (Cow. H. L., vol. i., 142.) The rulings on this point are not unanimous.

36. Q. Besides the wife and mother, who are entitled to maintenance?

A. The stepmother, grandmother, son's widow, the unmarried daughter and sister not otherwise provided for; those who by reason of some incurable mental or physical disease are disqualified for inheritance; as also their children, wives, or unmarried daughters. With regard to outcasts and their issue, the authority of Yajnavalkya might be cited; but in their case maintenance is restricted to food and raiment. (Cowell's Hindu Law, vol. i., p. 149.)

37. Q. What is the widow's power of alienation?

A. She cannot aliene her husband's estate without the consent of the reversionary heirs. In default of reversionary heirs, the Crown, as the ultimate reversioner, has the same power as the heir would have. Under the *Mithila* school she has power to consume, give, or sell the movables, but has no power over the immovables beyond a moderate enjoyment of them. In Toolsey Dass *v.* Doocowerban, the Bombay High Court said she had "uncontrolled power over the movables, but nothing more than a life use in the

immovable estate." Under the Bengal school the doctrine established was, that "the widow, in Bengal, has the entire right of property vested in her, both in the movable and immovable estate; that she is morally bound to take the advice of her husband's kindred, but is under no legal disability if she do not take or follow such advice." The Privy Council, in Kasheenath Bysack *v.* Hurrosundary Dassee, declared the widow entitled to the possession of both, and that she could not be deprived of it by the husband's relations. Her right to possession is absolute, and cannot be restricted; and that she was only entitled to enjoy it according to the rights of a Hindu widow. (Cowell's Hindu Law, vol. i., p. 198.)

38. Q. What is the character of the Hindu system of adoption?

A. Essentially a contract between parents, who assume to give and take the absolute property of a child. Neither registration, nor any written evidence of the act, nor the sanction of any Court of Justice, or any ruling power, is essential to its validity. Nevertheless, the utmost publicity is usual, and its absence suspicious. (Cowell's Hindu Law, vol. i., pp. 224 to 226.)

39. Q. How far is the ceremonial incidental to an adoption, or any portion of such ceremonial necessary in order to effect a valid adoption?

A. If once the fact of adoption is established, the Courts will not inquire into the performance of the secular and possibly not into the performance of religious ceremonies, merely for the purpose of testing its validity. There must be gift and acceptance manifested by some *overt* act; that overt act, as prescribed by Menu, being the pouring of water. Beyond this there is nothing absolutely necessary. (Cow. H. L., vol. i., 227; 1 Str. H. L. iv. 94; 9 Menu, verse 168.)

40. Q. What constitutes adoption for civil purposes?

A. Gift and acceptance *actual;* constructive gift and acceptance is not sufficient. (*Vide* answer to question 39; also Cowell's Hindu Law, vol. i., pp. 230—234.)

41. Q. Who may adopt? And who not?

A. Any Hindu destitute of male issue, that is, to whom no son has been born, or whose son has died. (Man. H. L. 33.) "By a man destitute of a son only, must a substitute for the same always be adopted." (Dattaka Mimansa, chap. i., v. 3.) A man adopting must be of age. In the case of a woman it must be with consent of her natural protector; in Bengal, her husband exclusively. Unmarried men may adopt. Impotent and excluded persons may adopt.

Minors and lunatics may not adopt. (Cow. H. L., vol. i., 251—256; Man. H. L. 36—46.)

42. Q. Who are "Sapindas," "Samanodakas," "Saculyas," "Bandhus"? that is, define these terms.

A. "*Sapindas*" of two descriptions—through consanguinity *and* connection by funeral oblations. The word in its ordinary meaning denotes connection through the *pinda*, or funeral cake.

"*Samanodakas.*"—Kindred connected by a common libation of water.

"*Saculyas.*"—The cognates above the fourth degree in ascent, or distant kinsmen.

"*Bandhus,*" *i.e.*, kinsmen sprung from a different family, but allied by funeral oblations. (Cowell's Hindu Law, vol. i., pp. 124—130.)

43. Q. What is meant by "heritage" in Hindu law?

A. That wealth which becomes the property of another solely by reason of relation to the owner. (Mac H. L. 137.) Heritage (Daya) is so defined in the Mitakshara: "The owner" is of course the *previous* owner.

44. Q. What are the rights of the natural father to inherit property acquired by his son through adoption?

A. None. The members of the family which he has quitted have no title to succeed to such estate. They are entire strangers to his estate ancestral or self-acquired. (Cowell's Hindu Law, vol. i., p. 357.)

45. Q. What is the point, with reference to adoption, which has been decided in Rungama *v.* Atchama, 4 Moore's Ind. Ap., p. 1?

A. The invalidity of a second adoption while the first adopted child is living. (Cowell's Hindu Law, vol. i., p. 292.)

46. Q. When may the son be adopted by two individuals?

A. The *dwyamushayana*, except, perhaps, in the case of the only son of a brother, may be said to be abolished. (Cowell's Hindu Law, vol. i., p. 342.)

47. Q. What is the decision of the Privy Council in the case of Dhurm Dass Panday *v.* Musst. Shama Soonderee Debiah, 3 Moore's Ind. Ap., p. 229?

A. The result of an act of adoption by a Hindu widow is, that the whole property is divested from her, and vested in the adopted son. She retains possession of her husband's property not as heir but as guardian and trustee of the

adopted son. Her interest in the estate is cut down to the widow's right to maintenance. (Cowell's Hindu Law, vol. i., p. 283.)

48. Q. (*a*) What is the effect of adoption? And (*b*) in determining the validity of the adoption, what is a court of law bound to inquire into?

A. (*a*) As respects *Kritrima* adoption, a son so adopted retains the right of succession and of presenting the funeral cake in his natural family, while he also acquires the same rights in his adoptive family. As respects *Dattaka* adoption, a child so adopted ceases to have any connection with his natural family, except that he cannot marry a member of it. He is incapable of performing the funeral rites of his natural father, and ceases to have any claim upon the family or estate. He represents the real legitimate son in relationship to his adoptive mother, and her ancestors are his maternal grandsires. (*b*) The adopter having no male issue; the consent of the parties; the child being eligible; gift and acceptance.

49. Q. What are the three chief points to be considered in actions brought against the heirs of an estate?

A. The debt must be for a good consideration; must be a ready-money transaction; if incurred for marriage or any other ceremonies, it must have been reasonable in amount. (Man. H. L. 75.)

50. Q. How long does minority last? At what age does it cease according to the several schools of law? State any special enactments you remember which affect the time at which majority is attained.

A. The completion of the sixteenth year generally throughout India. In Bengal, the commencement of the

sixteenth year, *i.e.* the completion of the fifteenth year. Various authorities, including Raghunandana, concur in fixing the sixteenth year as the limit of minority. (Cow. H. L., vol. i., 173; and Mac. H. L. 117.) But this point is a somewhat disputed one, and the subject has never been definitely settled. The result of legislative enactment is, that in Bengal and Bombay, the person, male or female, attains to independence at the age of eighteen, but in other parts of India sixteen is the age of majority, except in the Madras Presidency, where a Regulation provides the age of eighteen for those who are proprietors paying revenue to Government. Although eighteen is *possibly* the age of majority, according to the Indian Succession Act, for all persons domiciled in India, except Hindus, Mahomedans, and Buddhists, and although various Regulations and Acts have provided with respect to a large number, perhaps the majority, of Hindus and Mahomedans, eighteen shall also be the age of majority, yet there is another portion of the Hindu and Mahomedan community to whom those Acts and Regulations do not apply, and a residuum still left of those communities to whom it is a matter of doubt and perplexity what is the age at which their disabilities cease. (Cow. H. L., vol. i., 179.) The Registration Act and the Contract Act, in which minor is supposed to be defined, leave matters as they were. Why the law in India on this important point is not as clear as the law in England is a mystery—one which will probably shortly be solved by an enactment making eighteen the age of majority.

51. Q. Who may contract marriage?

A. The restrictions upon the right to contract a marriage depend upon considerations of relationship or caste. A woman may not marry a man of a caste beneath her; a man may marry in his own caste, or in an inferior one. In the present age, according to Mr. Sutherland, marriage with

one unequal in class is prohibited. The High Court of Bengal affirmed this principle in the case of Nelaram Nedgol *v.* Termam Bennen (9 S. W. R. 552); but the Madras High Court took a different view. They say, although the law recommends a marriage with a woman of equal class as a preferable description of marriage, yet the marriage of a woman of a lower caste than himself appears not to be an invalid marriage, rendering any issue illegitimate. (Pandaiya Tilava *v.* Palitilava, 1 Madras, 478; Cowell's Hindu Law, vol. i., p. 167.)

52. Q. If property be derived by the wife from a stranger, or earned by herself, in whom will it vest on her death? Will it follow the line of succession of *Stridhana?*

A. The general rule is, that it vests in the husband, and is unreservedly at his disposal. It will not follow the line of Stridhana. (Cowell's Hindu Law, vol. ii., p. 27.)

53. Q. What powers have the husbands and others over woman's property?

A. The *Stridhana* belongs to the woman exclusively, but the husband has a concurrent power over it, so that he may use it in any exigency for which he has not otherwise the means of providing, and this without being accountable afterwards for what he may have so applied. (Strange, vol. i., p. 27; Cowell's Hindu Law, vol. ii., p. 28.)

54. Q. State concisely the effect of the decision in Abraham *v.* Abraham, 9 Moore's Ind. Ap., p. 195.

A. Parcenership may be put an end to by severance effected by partition. It is equally put an end to by a severance which the Hindu law recognizes and creates; *e.g.*, an

outcast, one who has renounced his religion or who has become a convert to Christianity. (Cowell's Hindu Law, vol. ii., p. 50.)

55. Q. What is the rule laid down by the Privy Council in the Shiva Gunga case with regard to the undivided portion of an estate?

A. That the right of survivorship applied only to undivided property. (Cowell's Hindu Law, vol. ii., pp. 107—112.)

56. Q. What is the effect of an agreement to divide?

A. For a definition of 'partition' see Cowell's Tagore Lectures, 1871, pp. 60 to 64. The effect of such an agreement in Bengal, is the actual ascertainment of each member's share, with a view to separate enjoyment. In the other schools, the effect appears to be a division of title, not necessarily a division of enjoyment. In the latter it is more a declaratory decree than a specific one. (Cowell's Hindu Law, vol. ii., pp. 60—64.)

57. Q. What are the essentials in a civil point of view of a contract of marriage?

A. Betrothal. The matrimonial contract in itself fixes the relation of the contracting parties as married. The binding circumstances essential to the completion of a marriage are gift and acceptance of the girl. (Mac. H. L. 21; Str. H. L. 7.)

58. Q. What would a Court of Justice consider a justification of the absolute severance of the contract of marriage?

A. Adultery of the wife. (Mac. H. L. 22.)

59. Q. What is the meaning of the "Reflection of a son"?

A. The son of a woman upon whom, if he were begotten by the adoptive father, he would not be the production of an incestuous intercourse. (Mac. H. L. 47.)

60. Q. What is the ruling canon with respect to persons who may be adopted?

A. That no boy can be adopted with whose mother the adopter could not have married. (Mac. H. L. 47.)

61. Q. When an adopted son dies without issue, to whom will the property which he inherited from his adoptive father pass?

A. To the heirs of the latter. (Mac. H. L. 54.)

62. Q. Suppose an adoption should prove invalid, what would be the rights of the boy with reference to the property of his adoptive and natural fathers?

A. An invalid adoption does not sever the person so adopted from his natural rights. (Bawani Savkara Pandit *v.* Ambabay Ammal, 1 Mad. H. C. R. 363.)

63. Q. Under what circumstances does the order of succession to Stridhan vary?

A. According to the condition of the woman and the means by which she becomes possessed of the property. (Mac. H. L. 121.)

64. Q. What has the Privy Council declared in the case of Doorendronath Roy *v.* Musst. Heramonee Burmoneah to be the primary consideration in determining the rule which is to govern the right of succession?

A. The right to perform the Shraddha.

65. Q. Can an agreement between two heirs to divide be enforced by an action at law by the widow of one of them ?

A. Yes. (Mac. H. L. 193.)

66. Q. What power of alienation has a man under the Bengal school ? and by whom may joint property be alienated ?

A. A man may dispose of his property, moveable or immoveable, ancestral or self-acquired, as he pleases, by gift, sale, or will. (Cowell's Hindu Law, vol. ii., p. 4.) By all the members of the family jointly. (*Id.* 70.)

67. Q. What was the point settled by the Bombay High Court in Trimbak Anant *v.* Gopal Shet regarding the power to carry on a family trade ?

A. That, in an undivided Hindu family comprising infant members, the manager might sell family property to carry on the trade, if such an act be necessary, and for the general good. (Cowell's Hindu Law, vol. ii., p. 9.)

68. Q. What is the point of difference between the Bengal and Mitakshara schools as to the restrictions imposed on alienation by a widow ?

A. The former school restricts her with regard to moveables and immoveables; the latter only enforces those restrictions with respect to immoveables, both ancestral and self-acquired. (Cowell's Hindu Law, vol. ii., p. 17.)

69. Q. What is necessary to effect a valid transfer of property ?

A. Relinquishment *and* acceptance. Mere relinquishment is not sufficient. The donee must be a sentient being, and must be clearly designated. (Cowell's Hindu Law, vol. ii., p. 38.)

70. Q. What is the mother's power to alienate her deceased husband's estate during her son's minority ?

A. Such alienation to raise means to pay the father's debts and for support held to be legal under Hindu law. (Cowell's Hindu Law, vol. ii., p. 19.)

71. Q. Are "benamee" transactions as to alienations valid ? and in such a case what is the criterion of ownership ?

A. Yes. The criterion is by whom was the purchase-money paid. (Cowell's Hindu Law, vol. ii., p. 39.)

72. Q. What is the mode in which a transfer or conveyance may be effected as between Hindus by the Hindu law ?

A. It is not actually necessary that a contract or conveyance should be in writing; proof of a verbal grant of land, whether by exchange, sale, or gift, is good when followed by possession. Such gift resembles a grant by the English law of chattels, real or personal, before the Statute of Frauds. (Cowell's Hindu Law, vol. ii., p. 43.)

73. Q. What is the rule of law as to the construction of deeds when produced ?

A. That they ought to be liberally construed. The literal sense not to be regarded so much as the real meaning of the parties. (Cowell's Hindu Law, vol. ii., p. 43.)

74. Q. Name some of the things which by Hindu law are deemed to be impartible ?

A. A Raj; a Polliam, *i.e.*, a tract of country subject to a petty chieftain; self-acquisitions made without aid from the joint stock of the undivided family; buildings constructed by one member on the joint estate; gains of science. (Cowell's Hindu Law, vol. ii., pp. 52—59.)

75. Q. Who has a right to call for a partition?

A. The doctrine in Bengal is, that every member of a joint undivided family has an indefeasible right to demand partition of his own share. The other members must submit *nolens volens.* (Cowell's Hindu Law, vol. ii., p. 71.)

76. Q. What is the effect of two widows of the same man partitioning their deceased husband's estate?

A. The effect is merely to divide the enjoyment; the title remains joint, the surviving widow takes the whole. (Cowell's Hindu Law, vol. ii., p. 86.)

77. Q. After a partition, can there be a reunion? if so, what constitutes a reunion?

A. Yes; reunion is recognized by Hindu law. To constitute reunion there must be a junction of estate; living in one residence or carrying on joint trade is not sufficient. A reunion by descendants appears not to be a reunion in the sense of the Hindu law. (Cowell's Hindu Law, vol. ii., pp. 87—94.)

78. Q. What are the causes which lead to exclusion from inheritance?

A. (1) Those which spring from a man's conduct and lead to his expulsion; and (2) those which are derived from a man's natural state or condition disqualifying him for the performance of those spiritual acts which are to benefit the soul of the deceased. (Cowell's Hindu Law, vol. ii., p. 186.)

79. Q. Name some of the defects of natural state or condition which disqualify a man from inheriting?

A. Idiocy, blindness, dumbness, leprosy, unchastity, offspring of incestuous intercourse (Cow. H. L., vol. i., 189—196);

an impotent person, an outcast, one lame, born blind or deaf, or who has lost the use of a limb, a madman, an idiot, one incurably diseased (Mac. H. L. 86.) Besides the above, Strange gives—a devotee, illegitimate offspring, save among Sudras. (S. Mac. H. L. 39.)

80. Q. A died leaving a widow and one son B; the widow of A re-married in her son B's life-time; after her re-marriage B died. At B's death, was his mother entitled to succeed to his estate, or had she lost her interest as her son's heir by her re-marriage?

A. Under the provisions of Act XV. 1866, she is entitled to succeed to her son B's estate. (Cow. H. L., vol. i., 199.)

81. Q. How many modes are there of acquiring property?

A. Seven. (1) Succession; (2) occupancy or donation; (3) purchase or exchange; (4) conquest; (5) lending at interest, husbandry, or commerce; (6) acceptance of presents; and (7) from respectable men. (Inst. Men. 239, Mac. H. L. 66.)

82. Q. Name the encumbrances with which an estate is chargeable?

A. (1) Debts and other obligations in the nature of legacies; (2) certain specific duties to be provided for out of the estate where it has descended to a single heir, and out of the common fund where it has vested by survivorship in undivided co-heirs; (3) maintenance of all requiring and entitled to it. (Mac. H. L. 69.)

83. Q. How do sons inherit who are born after partition?

A. They succeed to the father's share, to the exclusion of the divided sons. (Mac. H. L. 146.)

84. Q. What is the status and right of the sons of an Englishman by a Brahman woman living apart from her husband ?

A. The sons are Hindus. (Mac. H. L. 147.)

85. Q. What are the modes of disposition of property recognized by the Hindu law ?

A. (1) By partition ; (2) by alienation or gift ; (3) by will. (Mac. H. L. 191.)

86. Q. What is the presumption of law with respect to a joint undivided family as to the estate ?

A. That the whole property is joint estate. The onus lies on the party claiming to establish the fact that the property is his separate property. (Mac. H. L. 192.)

87. Q. What is the widow's interest in the accumulations of her husband's estate ?

A. According to all the older authorities on Hindu law, accumulations must be treated in the same way as the *corpus ;* and by the ruling in *In re* Grose *v.* Amritamayi Dasi (4 B. L. R. 40), it was held that it should be so treated in the absence of any distinct authority to the contrary. (Cowell's Hindu Law, vol. i., p. 203.)

88. Q. If a man die leaving more than one widow, —say three widows—how does his property vest in them ?

A. The property is considered as vesting in only one individual ; the survivor or survivors take the property on the death of either of the widows, and no part vests in the other heirs of the husband until after the death of all the widows. (Cowell's Hindu Law, vol. i., p. 204, and see also answer to question 76, *ante.*)

89. Q. A man leaves three widows,—are they entitled by right to a partition of their husband's estate ?

A. No, not entitled. They can by agreement provide for the distributive enjoyment by an apportionment between themselves, but cannot interfere with one another's right to survivorship, nor affect the rights of their husband's heirs to succeed to the whole estate at the death of the last surviving widow. (Cowell's Hindu Law, vol. i., p. 207.)

90. Q. Under what circumstances may a man give his widow power to adopt ? and when does a man's right to make a second adoption accrue ?

A. In case of the failure at any time of his legitimate male issue, whether begotten or adopted. If he survives the first adoption. (Cowell's Hindu Law, vol. i., p. 276.)

91. Q. Is there such a thing as conditional adoption, or a conditional power to adopt. If so, what legally forms a condition on the happening of which such authority can be exercised ?

A. No such thing as conditional adoption; but a conditional power to adopt is of frequent occurrence, and extends to legalize the practice of successive adoptions. The condition must be the death of one son before another can be adopted. No other circumstances, such as disagreement between the son and his adoptive mother or stepmother, are proper conditions. (Cowell's Hindu Law, vol. i., p. 276.)

92. Q. To what class of property does the Hindu's power of testamentary disposition apply ?

A. Under the Mitakshara school, throughout Bengal, a man, who is the absolute owner of property, may dispose of

it by will as he pleases, whether it be ancestral or not. Even in Madras it is settled that a will of property *not ancestral* may be good. With regard to ancestral property, the Privy Council laid down that it is subject to be disposed of by will, unless by reason of some inherent peculiarity it be withdrawn from the testamentary power. The broad and general principle appears to be, that in all cases where a man is able to dispose of his property by act *inter vivos*, he may also dispose of it by will. (Cowell's Hindu Law, vol. ii., pp. 232—239.)

93. Q. What is the limit of the Hindu's testamentary power? Or, in other words, what is the limit of his disposing power? and how is this power regulated?

A. The Hindu Wills' Act, XXI. of 1870, has placed this power under statutory regulation so far as regards wills executed after the 1st September, 1870, in the Lower Provinces of Bengal, and in the towns of Madras and Bombay; otherwise, the extent of the testamentary power of disposition by Hindus is regulated by Hindu law. (Cowell's Hindu Law, vol. ii., pp. 240—263.)

94. Q. Can trusts be created by will? if so, to what extent?

A. In *In re* Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, it was laid down that, "putting out of the question the case of religious endowments, a devise by a Hindu which would be void as a condition is void in the shape of a trust." There is nothing contrary to the spirit and principles of the Hindu law in a devise to trustees which gives a beneficial interest to a person to whom it might have been given by a simple devise without the intervention of trustees. (Cowell's Hindu Law, vol. ii., pp. 252—260.)

95. Q. Can a Hindu by will create a qualified or particular estate ?

A. There is nothing in the spirit or principles of Hindu law against the creation of particular estates. In the case of Rewun Persad *v.* Musst. Radha Beeby, the Privy Council held that the widow took an estate for life, and that the two sons of the testator's brother each took a vested interest in a moiety of the estate so devised to the widow, expectant upon the termination of her life-interest therein. (N.B.—In this case all the devisees were in existence at the time of the testator's death.) (Cowell's Hindu Law, vol. ii., p. 261.)

96. Q. Can a Hindu by his will create a perpetuity ?

A. In Juggutsoondery's case (8 M. I. A. 66) the Judicial Committee gave effect to the rule against perpetuities. By the latest decisions it appears that "the extent of the testamentary power of disposition by Hindus must be regulated by Hindu law." So that, whether the Hindu law warrants the creation of a perpetuity, either by a will or deed of gift *inter vivos*, must depend upon the Hindu law alone. (Cowell's Hindu Law, vol. ii., p. 262.)

97. Q. State generally the changes effected by Act XXI. of 1870, regulating the mode of drawing up and executing of a Hindu's will.

A. (1) It abolishes, within the territories subject to the Act, nuncupative wills from the date mentioned in the Act; (2) the sections in the Indian Succession Act relating to privileged wills, which alone could be by word of mouth, are not by the Hindu Wills' Act made to apply to the case of Hindus; (3) the only sections* made applicable to them

* Sections 50, 51, 57, 58, and 59, Indian Succession Act.

provide that a testator *must* execute his will by signing or affixing his mark to his will, or authorizing some other person to sign for him in his presence; (4) and with reference to attestation, it is now the law that a Hindu will, affected by the Hindu Wills Act, must be attested by two or more witnesses, each of whom must have seen the testator duly execute the will by himself or by his deputy, &c. (Cowell's Hindu Law, vol. ii., pp. 270—272.)

98. Q. What are the powers inherent in the offices of executor or administrator of the will of a deceased Hindu ?

A. They stand in the position of ordinary managers; their powers being those which are incident to that position, unless, in the case of a will, they are, by the terms thereof, restricted or enlarged. An executor, moreover, takes no estate in his capacity of executor; the title to the estate of the deceased vests in him, as trustee thereof, only so far as the testator has so directed. (Cowell's Hindu Law, vol. ii., p. 278.)

99. Q. What is the position of the executor and administrator under the Hindu Wills' Act ?

A. He becomes the statutable representative of the deceased. He is the deceased's legal representative for all purposes, and all the deceased's property vests in him as such; and, further, the appointment may be express or by necessary implication. (Sections 179 and 182, Indian Succession Act.)

100. Q. What are the executor's or administrator's powers ?

A. (1) He has the same power to sue in respect of all causes of action that survive the deceased; (2) to distrain for all rents due to him at the time of his death as the

deceased had when living; (3) and also power to dispose of the property of the deceased, either wholly or in part, as he thinks fit. (Sections 267, 269, Indian Succession Act.)

101. Q. What are the executors or administrator's duties ?

A. He is bound, within six months of probate or administration, to exhibit to the Court from which he got such grant an inventory containing a full and true estimate of all the property in possession, and all the credits and debts; and in like manner, within twelve months, to exhibit an account of the estate, showing the assets to hand and how they have been applied or disposed of. (Section 277, Indian Succession Act.)

102. Q. Are there any provisions or is there any presumption under the Hindu law with regard to executors *de son tort ?*

A. With regard to executors *de son tort*, the Hindu law makes no provision and raises no presumption. (Cowell's Hindu Law, vol. ii., p. 284.)

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PRINCIPLES
OF
MUHAMMADAN LAW.

BY

SIR WILLIAM H. MACNAGHTEN.

WITH

(1) A SCHEDULE OF STATUTES, REGULATIONS, AND ACTS RELATING TO MUHAMMADAN LAW;

(2) EXTRACTS FROM THE WORKS OF SIR WILLIAM JONES, E. F. ELBERLING, NEIL BAILLIE, SHAMA CHURN SIRCAR, ALMARIC RUMSEY, &C.;

(3) A SUMMARY OF THE MUHAMMADAN LAW (PREFIXED),

AND

(4) A COPIOUS INDEX;

COMPILED BY

PROSUNNO COOMAR SEN,

EDITOR, LEGAL COMPANION.

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PREFACE.

A work on the Muhammadan law containing the rules of succession, inheritance, marriage, &c., which at present govern the Muhammadan community of India, and at a price quite within the reach of the legal public, has been long in want. Macnaghten's "Principles of Muhammadan Law" is indeed a work of very high authority, but it does not give the modifications and changes that have been brought about by the legislative enactments and by the authoritative decisions of the courts; and the works of the subsequent writers, such as, Neil Baillie, Shama Churn Sircar, Almaric Rumsey and a few others, are too costly to be available to the generality of the students. It is with a view to supply this want that the present publication has been undertaken. Its plan is the same as that of my work on Hindu law. To the great work of Macnaghten I have prefixed a "Summary" which, it is believed, will render the study of that work comparatively easy; and I have appended to it copious extracts from the works of Neil Baillie, Shama Churn Sircar, Almaric Rumsey, and a few others, to every one of whom my grateful acknowledgments are due for the very valuable aid I have derived from their works. The "Summary" will shew the changes and alterations that have been effected by the enactments of the Legislature, as well as by the decisions of the Courts. It is apprehended, however, that notwithstanding my most anxious endeavours to make the "Summary" accurate, and the "Extracts" full, I may have been guilty of errors and omissions, but this consideration does not deter me from placing before the public this humble contribution, as whenever there may be a doubt, the reader may usefully consult the work of Macnaghten itself, the original authorities (if available) and the Schedule of the Statutes,

Regulations and Acts relating to the Muhammadan law, that have been inserted in this volume. It is superfluous to add that I have spared no pains to render this volume generally useful, and that I was encouraged to its publication by the very cordial reception that my recent work on Hindu law lately met with from the generous public. It is therefore hoped that this humble publication also will meet with their kind patronage, which is earnestly solicited.

SERAMPORE,
March 1, 1881.

P. C. SEN.

TABLE OF ABBREVIATIONS.

B. Dig.	...	Baillie's Digest of Muhammadan Law.
Bail. M. L.	...	Baillie's Muhammadan Law of Inheritance.
B. L. R.	...	Bengal Law Reports.
B. L. R., (Sup.)	...	Bengal Law Reports, Supplemental Volume.
Bom. H. C. R.	...	Bombay High Court Reports.
C.	...	Consanguine.*
Elberling	...	E. F. Elberling's Treatise on Inheritance, Gift, Will, Sale and Mortgage.
Hed.	...	Hedaya.
h. h. s.†	...	how high soever.
h. l. s.†	...	how low soever.
I. L. R., Calc.	...	Indian Law Reports, Calcutta Series.
Ditto, Mad.	..	Ditto ditto Madras "
Ditto, Bom.	...	Ditto ditto Bombay "
Ditto, All.	...	Ditto ditto Allahabad "
L. C.	...	Legal Companion.
L. R., I. A.	...	Law Reports, Indian Appeals.
Mac. or Macnaghten		Macnaghten's Principles of Muhammadan Law.
Mad. H. C. R.	...	Madras High Court Reports.
Mat.	...	Maternal.
Moore's I. A.	...	Moore's Indian Appeals.
N.-W. P., H. C. Rep.		North-Western Provinces, High Court Reports.
Pat.	...	Paternal.
Rumsey	...	Almaric Rumsey's Muhammadan Family Inheritance.
Sel. Rep.	...	Select Report.
Sirajiyyah	...	Al Sirajiyyah translated by Sir William Jones with a Commentary by him.
1 Sircar, p.—	...	1st Volume, Shama Churn Sircar's Muhammadan Law (Tagore Lectures, 1873), page—
2 Sircar, p.—	...	2nd ditto ditto.
W. R.	...	Weekly Reporter.
W. R. Sp.	...	Ditto Special Number.
U.	...	Uterine.

* Means "related through a common male ancestor." Thus consanguine brother means a half brother by the father; the consanguine paternal uncle means the father's half brother by the father, &c.

† These are intended to apply to the preceding, not to the following, word. Thus "son's h. l. s. child" means child of a *son h. l. s.*, not *child h. l. s.* of a son.

ERRATA.

Page.	*Line.*	*For.*	*Read*
xii	22	are excluded	are also excluded
xxiv	8 (side note)	specei	special
xxx	6	person	a person
xxxii	14	shares,	shares
xxvii	3 and 4 (side note)	presumptive as to	—things
xli	4	Marbar	Mazhar
xli	4	All	1 All
xlii	26	ised	ized
lvii	16 (side note)	Bequests	Bequest
liii	17	public treasury	Crown

A

SUMMARY OF THE MUHAMMADAN LAW.

CHAPTER I.

INTRODUCTION.

Muhammadan law how far to be recognized.

THE whole of the Muhammadan Law, as contained in the Muhammadan Law Books, which was in force in India during the sovereignty of the Muhammadans or is at present in force in the several Muhammadan countries, such as Turkey, Arabia and Persia, is not the law of British India. So much only of that law, as has been directed to be observed in the British Courts of India by Acts* of Parliament or of the Indian legislature, is recognized by and administered in our Courts, in cases where the parties are Muhammadans.†

---

* See the Statutes, Regulations and Acts relating to the Muhammadan Law, pp. 77 to 131.

† The portions of the Muhammadan Law, which have not been directed to be observed, but have not also been expressly altered or abolished by legislative enactment, should continue to have a virtual operation in as far as they coincide with and express the principles of justice, equity and good conscience, but their application as a part of the Muhammadan law is not binding.—(Pearson, J., 6 N. W. P., H. C. Rep., p. 5.) Where a portion of the Muhammadan law has no force, its spirit and principles should be considered, because in so doing, the Courts shall act according to justice, equity and good conscience.—(Stuart, C. J, 6 N. W. P., H. C. Rep., p. 15) The application to Muhammadans of their own laws in cases other than those of inheritance, marriage, and caste (*e. g*, in case of gifts), is administering justice according to equity and good conscience.—W. R., Sp, 185. Slavery has been abolished by Act V of 1843. Renunciation of religion is no longer an impediment to succession since the passing of Act XXI of 1850. The Chapters on Contract and Sale are of little use since the enforcement of Act IX of 1872. The Indian Majority Act (IX of 1875) has settled the age of minority among all classes of British subjects, including Musalmáns.

Basis of Muhammadan law.

The basis of the Muhammadan law, religious, civil and criminal, is the *Kurán*, believed by the orthodox Musalmáns to be of divine origin and to have been revealed by an angel to Muhammad, their Prophet. (Elberling, s. 13.)

Sources of Muhammadan Law: *Kurán*, *Sunnat* and *Hadís*, *Ijmaa* and *Kiyás*.

The *Kurán* is the fountain-head and first authority of all their laws, but whenever it was not applicable to any particular case, recourse was had to the *Sunnat* or whatever Muhammad had done, said, or tacitly allowed, and also to *Hadís*, that is, to the Prophet's sayings or the narration of what was said or done by him, or was in silence upheld by him. The two other sources of Muhammadan law are the *Ijmaa* and *Kiyás*. The *Ijmaa* is composed of the decisions of the companions of the Prophet and their disciples. The *Kiyás* consists of analogical deductions derived from a comparison of the *Kúran*, the *Hadís* and the *Ijmaa*, when none of these do apply.—(1 Sircar, pp. 3 to 24.)

Difference of opinion among the expounders of law.

Although the *Kurán* is believed and received by all the Muhammadans as the words of the Most High, yet the discrepant interpretations of many of the material parts thereof given by the different expositors, the difference of opinion among the learned as to the principles or articles of faith, the admission of particular *Ahádís* (pl. of *Hadís*) by some doctors, and the rejection of the same by others, also the difference in the acknowledgment of a particular person or persons as being the Imám (spiritual leader) or Imáms, created different sets of doctrines; and the followers of each of such sets constituted a particular sect. The sects so formed are seventy-three in number, of which the Sunní and the Shiah are among the principal (1 Sircar, 11). The tenets of the former are adhered to in the greater part of

Formation of sects.

The Sunní and the Shiah Sects.

India.* Lucknow is the principal seat of the Shiah, otherwise called the Imamiya, sect.† Hence it is said, there are two schools of Muhammadan Law, the Sunní and the Shiah.

Sunní and Shiah Schools.

It has been held by the Privy Council that when a sect has its own rule, that rule should be followed with respect to litigants of that sect.—(Rajah Deedar Hossein *versus* Ranee Zuhoor-oon-nissa, 2 Moore's Indian Appeals, p. 441.)

Sects to be governed by their own rules.

The regulations which prescribe that the Muhammadan Law shall be applied to the Muhammadans, must be understood to refer to the Muhammadans not by birth merely, but by religion also.—(Abraham *vs.* Abraham, 9 Moore's Indian Appeals, p. 195.)

Muhammadan law to be applied to Muhammadans not by birth merely but by religion also.

The law allows a person the right to cease to be a Muhammadan in the fullest sense of the word and to become a Christian, and to claim for himself and his descendants all the rights and obligations of a British subject (2 Hyde 3).

A person may cease to be a Muhammadan.

A Muhammadan family may adopt the customs of Hindus subject to any modification of those customs which the members may consider desirable.‡—(Suddurton-nissa *vs.* Majada Khatoon, I. L. R., 3 Calc. 694)

Muhammadan families may adopt Hindu customs.

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* The general law of the country is that of Abu Hanifa. (Morley.) Imam Abu Hanifa was the founder of the Sunní sect called (after his name) *Haniftes.* Imam Abu Yusaf and Imam Muhammad were his two illustrious disciples. (Rumsey, p. ix.) The authority of Abu Hanifa and his two disciples Abu Yusaf and Imam Muhammad is paramount in Bengal and Hindustan. The opinions of the disciples are so much respected that, when they both dissent from their Master, the Judge is at liberty to adopt either of the two opinions. If there is a difference between the two disciples, whichever agrees with Abu Hanifa must be preferred, and in judicial matters the single opinion of Abu Yusaf is preferred to Imam Muhammad.—(Elberling, s. 17.)

† In India, the Nawabs and their relatives (with a very few exceptions) are *Shiahs.* By far the greater part of the Musalmáns in the province of Oudh held the *Shiah* faith with their kings. In Moorshedabad, the greater part of the Musalmáns including the Nawab Nazim is *Shiah.* In Calcutta and its suburbs, besides the Mughals, who are hereditary *Shiahs,* the members of that sect are not much less than that of the *Sunnis* (2 Sircar, 174).

‡ A judge is not bound, as a matter of law, to apply to a Muhammadan family living jointly, all the rules and presumptions which have been held by the High Court to apply to a joint Hindu family. It rests with him to decide in any particular case how far he should apply those rules and presumptions. (I. L. R., 3 Calc. 694.)

CHAPTER II.

INHERITANCE.

SECTION I.

GENERAL RULES.

Four successive duties belonging to the property of the deceased.

THERE belong to the property of a person deceased four successive duties: first, his funeral ceremony and burial, without superfluity of expense, yet without deficiency; next, the discharge of his just debts from the *whole of his remaining effects;* then, the payment of his legacies out of a *third of what remains after his debts are paid;* and, lastly, the distribution of the *residue* among his successors. (Sirájiyyah, p. 2.)

Disinheritance.

Neither a child nor any other heir can be disinherited, nor can one heir be favored to the prejudice of the other; but as a man is at liberty to dispose of his property as he pleases, *during his lifetime,* he can, under the common rules of gift, make such disposals as will virtually amount to a disinheritance, or a disposal in favor of one of his heirs. (Elberling, s. 88.)

Property of all kinds inheritable without distinction.

In the Law of Inheritance, there is no distinction between real and personal, nor between ancestral and acquired property. (Macnaghten, p. 1.)

Of primogeniture.

Primogeniture* confers no superior right. (*Ib.*)

Simultaneous succession of a plurality of heirs.

To the estate of a deceased person, a plurality of persons having different relations to the deceased, may succeed simultaneously, according to their allotted shares; and

* This right is partially recognized by the Shiah School though not at all by the Sunni (2, Sircar, Princ. 60). According to the Imamiya law of inheritance, the elder son, if he be worthy, is entitled to his father's sword, his kurán, his wearing apparel, and his ring. (Macnaghten's Princ. Mah. Law, page 40.)

inheritance may partly ascend and partly descend at the same time. (Macnaghten, p. 2.)

No right by representation.

The nearer of kin excludes the more remote, and the right of representation is unknown. That is, the right to represent an heir of the deceased who had died before him or her does not obtain, the nearer of kin excluding the more remote.

Females inherit.

Females are not only not excluded from inheriting, but besides that some—the widow, mother, daughter and sister—are very near heirs; females always get half the share of their brothers, when inheriting with them, and take with the same full proprietary right as males; so that the property devolves after their death on *their* heirs. The same is the case with widows, who take their share without any restriction in the disposal of it, and after their death, the property inherited from the husband, goes to their heirs, not to the heirs of their husbands. (Elberling, s. 89.)

Relative shares of male and female heirs of equal grade.

The share of a female is half the share of a male of parallel grade when they inherit together. The exceptions to this rule are the cases of father and mother and of half-brothers and sisters by the same mother but by different fathers.

Heirs of full and half-blood

Among the heirs of the same grade, those of the full blood are preferred to those of the half. Half-brothers and sisters on the mother's side are exceptions to this rule.

Renunciation of inheritance.

There may be a renunciation* of a right to inherit, implied from the ceasing or desisting from prosecuting a claim.—17, W. R. 108. (See 22, W. R. 267.)

A person taking by inheritance cannot disclaim; in other words, inheritance requires no acceptance, and cannot be

* Renunciation implies the yielding up a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. Renunciation of inheritance in the lifetime of the ancestor is null and void, as in point of fact it is giving up that which has no existence.—(Macnaghten's Precedents, Mah. Law, Case xi.)

Disclaiming of inheritance.

annulled by rejection; while on the other hand, a bequest may be accepted or rejected at pleasure. (Rumsey, 10.)

Surrender of inheritance.

Any one of the heirs may surrender his portion of the inheritance for a consideration, *i. e.*, by taking a sum of money or any article.*

Impediment to succession.

Homicide is an impediment to succession. The other three impediments (mentioned in Muhammadan law books), slavery, difference of religion and difference of allegiance, have now been removed; slavery having been abolished by Act V of 1843; difference of religion by Act XXI of 1850; and difference of allegiance by the subversion of the Muhammadan rule.

Mental derangement is no impediment to succession. 11, W. R. 212.

Want of chastity is no impediment to inheritance. *See* 6, W. R. 303.

Step connections.

A step-daughter is no heir (1 Sircar, 100).

A step-mother is no heir (1 Sircar 111).

Adopted son.

An adopted son cannot inherit. 9, W. R. 502.

Illegitimate children.

Illegitimate children can inherit only from their mother and mother's kindred, but not from the father.†—(Mac. Precedents, Case XII.)

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* Macnaghten seems to lay down (See Principle 87) that the remainder of the share (of the surrenderor) will go to the residuaries; but according to Sirájiyyah, p. 13, all the other heirs divide the remaining property among them in the ratio of their respective fractional portions. Thus, if the portions be $\frac{1}{4}$, $\frac{1}{3}$ and $\frac{1}{5}$, and the person entitled to $\frac{1}{5}$ take a specific object instead, the other two will divide the remainder in the ratio $\frac{1}{4}$: $\frac{1}{3}$, or 2 : 1. But in calculating the respective shares of the other heirs, the taker of the specific thing should not be left out of consideration, as if he were dead or incapable of inheriting; because in that case there would be either a *defect* or an *excess* in some of the allotments to the other claimants. For instance, a man leaves a father, a mother and two daughters. Here if one of the daughters surrenders her portion, we must not calculate the shares as if the deceased had left one daughter, a father and a mother; because in that case the share of the (one) daughter would be $\frac{1}{2}$, the share of the mother $\frac{1}{6}$ and that of the father $\frac{1}{3}$; whereas the correct rule is to find the respective shares of all the heirs including the taker of the specific thing and then to divide the remainder of the property among the remaining heirs in proportion to their shares.

† Nor can the father inherit from them.—(Mac. Precedents, Case XII.)

A postumous son has a legal right to inherit. It is not necessary that the heir should be actually born; it is sufficient that he was begotten and afterwards born with vitality. When born with vitality it is of no moment how soon after the child may expire; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child. (Elberling, s. 84; 9, W. R. 257.)

Posthumous children.

A *khoonsa*, or hermaphrodite, is defined as a person having the generative organs of both sexes. The Muhammadan law divides such persons into three classes, those in whom distinguishing tokens of manhood appear alone or preponderate, those in whom distinguishing tokens of womanhood appear alone or preponderate, and those in whom neither appear or both appear equally. The first sort are accounted males, the second females, the third are called "equivocal" or "ambiguous" hermaphrodites. A hermaphrodite of doubtful sex during infancy will, if distinguishing tokens appear when it arrives at maturity, be considered to be a male or a female as the case may be. According to Abu Hanifa, an equivocal hermaphrodite takes the same portion as a male or a female on the same level, and if there be no such male or female, the same that would be taken by such male or female, if any, whichever is the smaller under the particular circumstances of the case.—(Rumsey, p. 153.)

Hermaphrodite.

The rule as to persons [related to each other] who die by a common calamity [as the sinking of boat, the fall of a house, common conflagration and the like], so that it is not known which of them died last, is that they are to be considered to have died at the same moment, so that the property of each goes to his living heirs, and none of them can be heir to another, unless it is known in what order they died, when those who died last will inherit to those

Persons dying together.

who died before them. (*Bail. M. L.*, 172, 194 and 195. 1 Sircar, p. 194.)

Missing persons.

A person is missing when he has gone away and it is not known where he is, or whether he is dead or living.

Missing person's share to be reserved.

On the death of any of the relatives of a missing person, to whom he (the missing person) is an heir, his share is to be reserved, on account of the possibility of his being alive. If he returns, he will be entitled to his share; if he does not, and his death is presumed* according to law, the share reserved for him will go *not to his heirs*, but to the persons who were the heirs of the relative that died, and who would have been entitled to the whole inheritance if the missing person had never existed. If the period after which death is presumed by law shall elapse without the missing person being heard of, his own property will go to his heirs. (See B. Dig., 713.)

Captives.

"The rule concerning a captive *is* like the rule of other believers in regard to inheritance, as long as he has not departed from the faith, but, if he has departed from the faith then the rule concerning him *is* the rule concerning an apostate; but, if his apostacy be not known, nor his life, nor his death, then the rule concerning him *is* the rule concerning a lost person." *Sirájiyya*, p. 58.

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* The death of a missing person is determined either upon the expiration of ninety years from his birthday, or, when not one equal to him in age of the same village or town remains alive (1 Sircar, p. 188; Bail. Dig., 713).

SECTION II.

ORDER OF SUCCESSION ACCORDING TO THE SUNNI SCHOOL.

THE successors to a deceased Muhammadan are of seven descriptions, *viz.*, Seven kinds of successors.

1. Legal Sharers.*
2. Residuaries.†
3. Distant Kindred.
4. Successor by Contract.
5. Acknowledged Kindred.
6. Universal Legatee.
7. Crown.

, All the heirs do not succeed at once; but, of the sharers and residuaries, there is an inner circle immediately connected with the deceased, who are never entirely excluded from the succession, though their portions are liable to reduction in some cases. These are the husband or wife, the father, mother, son and daughter. Of heirs beyond the circle, the grandfather and grandmother are merely substitutes for the father and mother, and the remainder are entirely excluded whenever there is a relative within the circle, through whom they are connected with the deceased, or one nearer in degree to him than themselves. These rules however, are subject to some qualification. It can but seldom happen that the deceased should leave no individual connected with him, who would come under one or other of the above two classes of heirs.

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* They are the father, mother, husband, wife, daughter, son's daughter, grandfather, grandmother, full sister, half-sister by same mother, half-sister by same father, and half-brother by same mother.

† They are all persons in whose line of relationship to the deceased no female enters; such as, the son, son's son h. l. s.; father, father's father h. h. s; brother, C. brother, brother's son h. l. s, C. brother's son h. l. s.; Pat. uncle, C. Pat. uncle, Pat. uncle's son h. l. s., C. Pat. uncle's son h. l. s.; great-uncle, great-great-uncle, and all the more remote male relations through males (in other words, Pat. and C. Pat. uncles of the father and father's father h. h. s., and their sons h. l. s.) There are also some female residuaries, but they are not primarily so. See the section on residuaries. (*Vide* Rumsey, p. 25.)

Legal sharers. *Legal sharers* are all those persons for whom specific shares have been appointed or ordained in the sacred text, the traditions, or with general assent (B. Dig. 696). After the sharers* are satisfied, if there remains a residue of the property left by the deceased, it is to be divided among the next class of heirs called residuaries. If there be no residuaries, the residue will revert to the sharers in proportion to their shares (except to the husband and wife).†

Residuaries. *Residuaries* are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied, or the whole estate when there are no sharers. In default of the sharers and residuaries, the distant kindred inherit.

Distant kindred. *Distant kindred* are all relations who are neither sharers nor residuaries. They succeed in default of sharers and residuaries. When there are neither sharers† nor residuaries nor distant kindred, the inheritance goes to the successor by contract.

Successor by Contract. *Successor by contract*‡ is a person, to whom the deceased owner being one of unknown descent, had said "Thou art my Mowla (master) and shall inherit to me when I die, paying my fine, when I commit an offence," and he answered, "I have accepted." He succeeds in default of sharers, residuaries and distant kindred. In default of heirs down to the successor by contract, the acknowledged kindred inherits.

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* Some sharers, however, are liable to exclusion by residuaries. See the section on Exclusion.

† It should be here noted that the husband or wife is excluded from getting more than his or her specific share, as long as there is any other sharer or residuary or distant kindred, but he or she succeeds to whole of the inheritance in default of heirs down to the distant kindred. The successor by contract comes in when there are neither sharers (including husband or wife) nor residuaries nor distant kindred.

‡ Instances of this kind of heirs are rare, if any, at the present day.

*Acknowledged kindred** is a person in whose favor the deceased has made an acknowledgment of kindred, provided the acknowledgment was never retracted. In default of the acknowledged kindred, the universal legatee succeeds. Acknowledged kindred.

Universal legatee† is a person to whom, in absence of heirs (of the above descriptions), the whole property has been devised. Next in succession is the Crown. Universal legatee.

Crown‡ takes the property in default of all other heirs. Crown..

SECTION III.

SHARERS.

THERE are twelve§ classes of persons, called *Sharers*, out of whom some get specific portions of, while others are totally excluded from, the inheritance. Who are sharers.

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* To make an acknowledgment valid, three conditions must be observed: 1. It must be in such term as at least to imply the descent of the person acknowledged from other person than the acknowledger himself, as for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son. 2. It must be such, as not to establish the descent of the person acknowledged, for instance not an acknowledgment of one as a brother *assented to by the acknowledger's father*, which under some exceptions would establish the paternity, as this would give the party an interest in the inheritance on a ground distinct from the acknowledgment, namely as brother to the deceased. 3. The acknowledger must die without retracting his acknowledgment. (Sharifiyya, 10) An acknowledgment by any person is effectual as regards that person's property, but ineffectual as regards all other people. (*Hed.* xxviii, Section 5.)

† Though the law does not allow a Muhammadan the power of disposing by will of more than a third of his property, still if he has appointed a legatee of the whole and has left no known heir, nor successor by contract, nor acknowledged kindred,—such legatee is permitted to take the property; for the prohibition against bequeathing more than a third exists solely for the benefit of the heirs.—Elberling, 44.

‡ In the Muhammadan Law Books the reader will find that the "Public Treasury or Bayitool-mal" is mentioned as the place where the property left by the deceased is to be kept in deposit, on failure of heirs, for charitable uses, such as paying the funeral expenses of those who leave no property, &c., &c. But, at present, Bayitool-mal in the exact sense in which that expression is used in the Muhammadan Law Books is an extinct institution; hence, the property escheats to the Crown. (*See* Musst. Soobhanee *vs.* Bhetun, 1 Sel. Rep., new ed., p. 467.)

§ It is inaccurate to say generally "there are twelve sharers."

TABLE OF SHARERS.

Table of sharers.

HUSBAND.	MOTHER.	FATHER.	DAUGHTER.
WIFE.	Grandmother.*	Grandfather.†	Son's daughter.‡

Half-brother by mother.
Half-sister by mother.
Full sister.

Half-sister by father.

Exclusion of particular sharers.

The persons above enumerated do not all succeed simultaneously; nor are their shares always the same. Excepting the husband, wife, mother, father and daughter, all other sharers are liable to exclusion in particular cases. As for instance, the grandmother, whether paternal or maternal, is excluded when there is a mother. (Paternal grandmother is also excluded when there is a father.) Grandfather is excluded when there is a father. Son's daughter is excluded when there are two or more daughters. All kinds of brothers and sisters are excluded by father or grandfather. Half-brother by mother and half-sister by mother are also excluded by daughter or son's daughter. Half-brother by mother, half-sisters by mother and full sister do not exclude each other. Half-sister by father is excluded by two or more full sisters, &c. Some sharers are excluded by residuaries. See the section on exclusion.

Some sharers become residuaries.

The following female sharers lose their character of sharers and become residuaries, when there exist one or more males in the same or a lower degree :—

Daughter made residuary by ...		Son.
Son's daughter	... ...	Son's son h. l. s.
Full sister	... ...	Full brother.
Half-sister by father	...	*Her* brother.

* True grandmother how high soever. †Paternal grandfather how high soever.
‡ As well as daughter of son's son, of son's son's son, &c.

Two or more sharers of a particular class (except when otherwise* specified) take equally among them the same portion that one of that class, if alone, would take; *e. g.*, the share of a wife being $\frac{1}{8}$, if there be four wives they will divide that $\frac{1}{8}$ among them.

Equal division among individuals of a class.

In order to ascertain whether in a particular case a given sharer gets *any* portion of the inheritance or not, the reader may usefully refer to the following particulars regarding the sharers.

SOME PARTICULARS ABOUT SHARERS.

Husband.

THE husband must, in all cases, get a share, whatever may be the number or degree of the other heirs. The husband takes a fourth of his wife's estate where there are children or son's children, how low soever, and a moiety where there are none. On failure of other sharers, residuaries and distant kindred, the husband is entitled to take the whole of the property left by the wife. (See *Mussamut Soobhanee* vs. *Bketun*, 1 Sel. Rep., S. D. A., 346; also 1 Sircar 91 and 234; I. L. R., 3 Calc. 702.)

Wife.

The widow must, in all cases, get a share, whatever may be the number or degree of the other heirs. The widow takes an eighth of her husband's estate, where there are children or son's children, how low soever, and a fourth where there are none. In law there is no distinction between a wife married in her maidenhood and that married when widowed or divorced. Consequently widows of all descriptions† have equal rights to the estate of their deceased husband. All the widows are therefore collectively entitled to receive and equally divide among themselves, one-fourth or one-eighth of the deceased's estate as the case may be.

* When there is no son, the share of one daughter is $\frac{1}{2}$, but of two or more, is only $\frac{2}{3}$. So, of son's daughters, full sisters, &c. See Table of Sharers, p. 177.

† According to the *Shiah School*, no right of inheritance is established by reason of *muta* or temporary marriage, unless there is a contract between the marrying parties.

The widow is competent to inherit her husband's property, supposing her not to have been divorced from him and not to have killed her husband.

According to the *Shiah School*, the widow does not get a share of the land or the like left by her husband, unless he left a child by her; she is however entitled to her share of any other properties left by her husband.—(2 Sircar, p. 185; 20 W. R., 297.)

In default of other sharers, the residuaries and the distant kindred, the widow is entitled to the return to the exclusion of the fisc.* (*Mahomed Arshad Chowdry* vs. *Sajida Banoo*, I. L. R., 3 Calc. 702; 1 Sircar, pp. 91 and 234; Rumsey's M. Family Inheritance, p. 44; 1. Sel. Rep., S. D. A., 346, New Ed., p. 467.)

According to the *Shiah School*, where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies, leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury.—(Macnaghten, p. 37.)

The widow of a Khoja Muhammadan who has died childless and intestate succeeds to her husband's estate in preference to his sister. (*Rahimat Bai* vs. *Hir Bai*, I. L. R., 3 Bom. 34.)

Mother.

The mother must in all cases get a share, whatever may be the number or degree of the other heirs. She takes in three cases: 1—a sixth of the whole when there is a child or son's how low soever child, or two or more brothers or sisters, whether of the whole or half blood; 2—one third of the residue when there is a father† and a *husband* or *wife* (whose, *i. e.*, husband or wife's, share must be first allotted), but no child or son's h. l. s. child nor two or more brothers or sisters; 3—a third of the whole, in all other cases. By 'mother,' however, must be understood the deceased's own mother who bore him, and not a step-mother, who, in law, is considered not a mother,

* According to the *Shiah School*, the remainder *never* reverts to the widow, but goes to any other heir that may happen to exist at the time, even to the *Imám*, who is the last of all heirs, and whose existence is always recognized.

† *Father* does not include *grandfather*. When there is a mother, a father, and a husband or wife, first the share of the husband or wife, as the case may be, must be deducted, then, of the residue, ⅓ should be allotted to the mother, and ⅔ to the father.

but father's wife; she therefore cannot have the maternal share of inheritance, which is a right appertaining to the genetrix alone. Although it is a rule of Muhammadan law that whoever is related to the deceased through any person shall not inherit while that person is living, the mother does not exclude her children. Mother excludes from the inheritance father's mother and mother's mother, how high soever.

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*Grandmother.**

True grandmothers whether paternal or maternal can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father. A sixth is the share of the *(true)* grandmother. Grandmothers, who are nearer in degree to the deceased, exclude those who are more distant.† False grandmothers are not sharers but distant kindred. Two or more true grandmothers, being of equal degree (though of different lines), share the sixth equally. Paternal female ancestors of whatever degree of ascent are excluded by the grandfather, except the father's mother; she not being related through the grandfather. As the degrees of the paternal grandfather increase, so does the number of the grandmothers on the father's side, who inherit with him, increase.‡ (1 Sircar, 113).

Where a grandmother has but one relation, and another has two or more, the most approved opinion is that they both share equally (1 Sircar, 114), as,—

Where one grandmother is			father's mother's mother.
and another	do.	is	mother's mother's mother, *also* father's father's mother.

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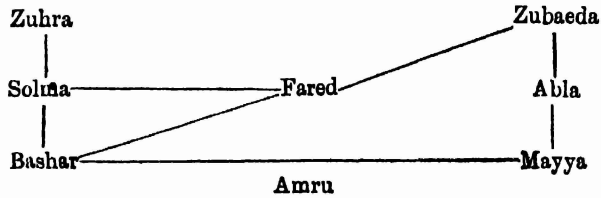
* Grandmother, *i. e.*, true grandmother, is any lineal female ancestor in whose line of relationship to the deceased a false grandfather does not enter, and a false grandfather is a lineal male ancestor between whom and the deceased a female is interposed.—Bail. M. L., p. 65.

† The nearest grandmother or female ancestor on either side excludes the distant grandmother on whichever side she be, (no matter) whether the nearest grandmother be entitled to a share of the inheritance or be herself excluded.—*Vide* Serájiyyah, 15. Thus the paternal grandmother is excluded by the father, but she is nevertheless capable of excluding the mother of the mother's mother, though the latter would not be excluded by the father himself.—Elberling, s. 108.

‡ Thus where the grandfather is distant from the deceased by three degrees, there three grandmothers on the father's side (who are equal in degree) succeed with him, as for instance,—father's father's *father's father* being removed 3 degrees from the deceased, 3 persons succeed with him. They are (1) father's father's *mother's mother*; (2) father's father's *father's mother*; and (3) father's mother's *mother's mother*.

E. G., suppose, *Zubaeda* gave her daughter's daughter *Mayya* in marriage to her son's son *Bashar*, and the young pair had a son *Amru*, who acquired an estate, and died. Now *Zubaeda* was both paternal and maternal great-grandmother of *Amru*, and had, therefore, a *double* relation to him ; but another woman, named *Zuhra*, had married her daughter *Solma* to *Fared*, who was the son of *Zubaeda*, brother of *Abla*, and father of *Bashar;* so that *Zuhra* was *Amru's* paternal grandmother's mother, and had only a *single* relation, as it will appear by the following arrangement of the family :



Father.

The father must in all cases get a share, whatever may be the number or degree of the other heirs. He inherits in three cases or ways :—*viz.*, [he takes] 1—an absolute share, which is a sixth (unmixed with any residuary portion) when the deceased leaves son or grandson how low soever ; 2—a legal share as well as a residuary portion, in the case of the deceased leaving a daughter or a daughter of his son how low soever in the degree of descent ; and 3—a simple residuary portion, and this on failure of (the deceased's) children and son's children or other descendants how low soever* (1 Sircar, 95). The true grandfather, *i. e.*, the father's father, is entirely excluded from inheritance by the father. The father's mother is also excluded by the father. Brothers and sisters are also all excluded by the father.

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* According to the *Shiah School*, a father gets a sixth as his specific share in the case of there being a child or children how low soever, while in default of such issue of the deceased, he gets the whole of the residue remaining after allotment of the appointed share or shares (2 Sircar, 185). The father of the deceased, upon failure of issue, is not a specific sharer in the estate, but has by law merely a residuary title to all that remains after distribution of the other shares. Thus, if a person deceased should leave, for example, a father, a mother, and a husband, the mother, in this case, takes a third, if not partially excluded by brothers or sisters ; the husband also enjoys his appointed share, *viz.*, a half, and the remaining sixth is all that would go to the father. (Col. B. Trans. p. 383.)

Grandfather.

Grandfathers can never take any share of the property where there is a father. In default of the father, the true* grandfather has the same interest or right as the father had, except in three cases: (1)—the father's mother does not inherit with father, whereas she inherits with the grandfather; (2)—if the deceased leave parents, and either of the married couple, then the mother takes one-third after the allotment of the spouse, but if there be a grandfather instead of the father, the mother takes a third of the whole property; 3—the brothers and sisters by the same father and mother, and by the same father only, are all excluded by the father, whereas they are not excluded by the grandfather.† (1 Sircar, p. 97.)

Daughters.

Without sons, daughters are legal sharers; with sons, they are mere residuaries. An only daughter takes a moiety, two or more daughters collectively take two-thirds of the deceased's estate, in the event of his *leaving no son or sons;* but if he left also a son or sons, then the daughters are no longer *sharers*, but are rendered *residuaries*, and each of them is, in that case, entitled to a portion equal to half of a son's share.‡ A step-daughter is not an heir.§

Son's Daughters.

Son's daughters can never take any share of the property when there is a son or more daughters than one.|| Where there is one daughter, the son's daughters take a sixth. Where there is a son's son, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great-grandson (*Mac.*

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* True grandfather, *i. e.*, paternal grandfather, or father's father, his father and so forth, into whose line of relationship to the deceased no mother enters. A false grandfather is a male ancestor related to the deceased by the intervention of a female ancestor, as a mother's father or father's mother's father, so forth.

† But this is not the general opinion. *Vide* Macnaghten's note to Principle 21, p. 4.

‡ 1 Sircar, p. 100. § Macnaghten's Precedents, Case 22.

|| If the deceased left two or more daughters then his son's daughter or daughters get nothing, unless there be in an equal degree with, or in a lower degree than, them, a male, by whom they are rendered residuaries, and the residue remaining after the two-thirds of the estate have been taken by the deceased's daughters is divided between this male and the son's daughter or daughters according to the rule—"The male has double the portion of a female." (1 Sircar, p. 101.)

p. 3 and 4.) A son's only daughter takes a moiety, two or more such daughters take two-thirds, of their late grandfather's estate in the event of his leaving no son, nor daughter, nor son's son. If the deceased left neither a son nor daughter, but only his son's son and daughter, then the whole of his estate will be taken by them, the grandson taking two shares and the granddaughter one share. (1 Sircar, p. 101 and p. 102.)

Though son's daughters are entirely excluded as *sharers*, when there are two or more daughters, they are nevertheless in some instances admitted to a trifling participation in the inheritance. This happens when there is a male, or males, in the same or a lower degree, entitled to the residue. Suppose that the deceased has left no son, but two or more daughters and grandchildren, both male and female, by a son. Here two-thirds being set apart for the daughters, there is nothing to pass to the son's daughters as sharers; but, if there be no other legal sharers, the remaining third is divided, as residue, between the grandchildren, in the ratio of two parts to a male and one to a female. Strictly speaking, the operation of this rule ought to be confined to the case where the residuary is in the same degree with the daughters of the son. But it has seemed hard that they should be deprived, by a more remote relative, of an advantage, which they enjoy with one who is nearer, and the rule has been extended accordingly. The extension however is limited to cases where the more enlarged construction is beneficial to them; for whenever they happen to be legal sharers, it is only by a male of the same degree that they can be made residuaries. The same principles are applicable to the daughters of a grandson, and so on. (Elberling, s. 103.)

There is a curious point about descendants of this kind; that if there be actual son's daughter and a son's son's daughter, but no daughter, the two survivors stand with respect to each other in precisely the same position as a daughter and an actual son's daughter, that is, the actual son's daughter takes a half, and the son's son's daughter $\frac{1}{6}$. The same rules apply to any lower stage of descent. (Rumsey, p. 37.)

Half-brothers and Sisters by the Mother.

Half-brothers and sisters by the same mother are entirely excluded by the existence of a child, or the child of a son how low soever, or

of a father or true grandfather, but in all other cases, they inherit, the legal share of one, being a sixth, and of two or more, one-third. There is no distinction in this case in favor of the sex, both males and females having the same right and succeeding equally.[1] (Elberling, s. 112 ; 1 Sircar, 97.)

Full Sisters.

In default of the father, and grandfather of the late owner, as well as his own and son's children, the only sister of the whole blood takes a moiety, two or more full sisters collectively take two-thirds of his estate; but if there exist a full brother or brothers, then their existence renders the sister or sisters residuaries, and each of them, in that case, gets a portion amounting to half of what is succeeded to by each brother: the sister or sisters become also residuaries if the deceased left his own or his son's daughter or daughters; and in this case and state, the sister or sisters get no portion as *sharers*, but take as *residuaries* the residue remaining after the daughter or daughters have taken her or their legal share or shares.[2] (1 Sircar, p. 105.)

Full sisters are excluded by father, grandfather, son or son's son how low soever.[3]

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[1] It is said, Princ. Muhammadan Law, viii. 2—"that the general rule of a double share to the male applies to their issue," but their issue are neither sharers nor residuaries, but belong to the distant kindred (Sec. 124,) and it is the general opinion that their succession is regulated in the same way, as that of their parents, without any distinction on account of sex—Baillie, p. 69.

[2] Sisters by the same father and mother may be in five cases: half goes to one alone; two-thirds to two or more; and if there be brothers by the same father and mother, the male has the portion of two females; and the females become residuaries through them by reason of their equality in the degree of relationship to the deceased; and they take the residue, when they are with daughters, or with son's daughters, by the saying of him on whom be blessing and peace! "Make sisters with daughters, (*a*) residuaries."—Serajiyyah, p. 7.

(*a*) Here the two plural terms, (*i. e.*, sisters and daughters) are in their unlimited sense, importing one as well as many.—Sharihyyah, p. 41.

Thus a single sister also is rendered a residuary by one as well as many daughters of the late owner or of his son.

[3] "There are five conditions in which full sisters may be found. Three of these occur, when there are neither children nor children of a son how

Half-sisters by the father.

Half-sisters by the father come into the place of full sisters, when there are none; that is, the share of one is a half, and of two or more, two-thirds; while with daughters and son's daughters, they become residuaries. With *one* full sister, whenever she is entitled to a half they take the complement of two-thirds, *viz.*, one-sixth; but by two or more full sisters they are entirely excluded, unless there happens to be a half-brother by the father, who makes them residuaries, when they become entitled to participate in the residue in the *ratio* of two parts to a male, and one to a female. (*Elberling*, s. 111.)

Half-sister by father is excluded by brother of the whole blood, and likewise by the sister of the whole blood when she is rendered a residuary by a daughter or son's daughter. (1 Sircar, p. 109.)

Half-sister by father is excluded by the son, son's son in how low a degree soever, also by the father, and even by the paternal grandfather. (1 Sircar, p. 108.)

Half-sisters by father become residuaries with the deceased's own or his son's daughter or daughters if any, and, in that case and predicament, the half-sisters take the residue remaining after the daughter or daughters have taken her or their legal portion. (1 Sircar, p. 107.)

SECTION IV.

OF RESIDUARIES.

Two kinds of residuaries.

THE residuaries are principally of two kinds:—

1. Residuaries by consanguinity; and
2. Residuaries for special cause.

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low soever; one full sister being entitled to a half of the property in that predicament, and two or more of them to two-thirds; while they lose their character of sharers when there are full brothers, whose existence renders them residuaries, the portion of each female then becoming half the portion of a male. In all the preceding cases, however, the share of the sisters is liable to be intercepted by a father, or true grandfather; by whom they are absolutely excluded, as well as by a son or son's son how low soever.—Bail. M. L., p. 67.

The residuaries by consanguinity[1] are divided into three classes: (1) Residuaries in their own right; (2) Residuaries in another's right; and (3) Residuaries together with another.

Consanguinous residuaries are of three classes.

Of the residuaries,[2] the nearest succeeds first, then the nearest.

Rule of succession.

Residuary in his own right.

A residuary in his own right[3] is every male in whose line of relation to the deceased no female enters.

Residuary in his own right.

The residue is divided equally among residuaries in the same degree and of the same sex; but, if they differ in sex,

Rule of division among residuaries.

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[1] The general rule in the succession of residuaries of this description is that—he who has two relations is preferable to him who has but one relation, whether it be male or female.

Thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the same father only; and the son of a brother by the same father and mother is preferred to the son of a brother by the same father only; and the rule is the same in regard to the paternal uncles of the deceased, and after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather. (*Serajiyyah, p.* 18.)

[2] When there are several residuaries of different kinds,—one a residuary in himself, one a residuary rendered by another, and a third a residuary with another,—preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first. (Bail. Dig., 694.)

[3] The residuaries in their own right, or male residuaries, are divided primarily into four classes, *viz*:—

1. The "offspring" of the deceased, *i. e.*, his sons and son's sons h. l. s.
2. The "root" of the deceased, *i.e.*, his father and true grandfather h. h. s.
3. The "offspring" of the father of the deceased, *i.e.*, brothers and C. brothers and their sons h. l. s.
4. The "offspring" of the immediate true grandfather of the deceased, *i.e.*, pat. and C. pat. uncles and their sons h. l. s.

These classes, however, do not exhaust the residuaries, for the general definition "every male in whose line of relation to the deceased no female enters" includes also the descendants of the higher true grandfathers; in other words, the pat. and C. pat. uncles of the father and tr. grandfather h. h. s. and the sons h. l. s of those uncles. (Rumsey, 45.) The definition of the 4th class, however, is more comprehensive in Shama Churn Sircar's Muhammadan Law, part I, p. 117. See the following:—

"The residuaries in their own right are of four classes: 1—the offspring (literally, part) of the deceased; 2—his root; 3—the offspring of his father; and 4—the offspring of his grandfather how high soever."

each male takes twice as much as each female. They take *per capita* and not *per stirpes*.

Of the *residuaries in their own right*:—

Sons. 1. The sons of the deceased being the nearest are entitled to succeed in preference to all other residuaries.

Son's sons h l s 2. In default of sons, their sons how low soever succeed.

Father. 3. In default of son's son how low soever, the father succeeds.

Grandfather. 4. In default of the father, the true grandfather how high soever, according to the proximity of degree, succeeds.

Whole brother. 5. In default of the true grandfather h. h. s., the full brother succeeds.

Half brother by father. 6. In default of the full brother, the half brother by the same father only succeeds.

Whole brother's son. 7. In default of the half brother by father, the son of the full brother succeeds.

Son of half brother by father. 8. In default of full brother's son, the son of the half brother by the same father only succeeds.

Whole and half brothers' grandsons in order. 9. In default of the son of the half brother by the same father, the grandsons h. l. s. of the full brother and those of the half brother by father succeed according to the above order (*see* the order in 5 to 8).

Full paternal uncle. 10. In default of the grandsons h. l. s. of the full brother and of those of half brother by the same father, the full paternal uncle succeeds.

Half paternal uncle by father. 11. In default of the full paternal uncle, the half paternal uncle by the same father only succeeds.

Whole paternal uncle's son. 12. In default of the half paternal uncle by the father, the son of the full paternal uncle succeeds.

Son of half paternal uncle by father. 13. In default of the son of the full paternal uncle, the son of the half paternal uncle by father succeeds.

14. In default of the son of the half paternal uncle by the father, the grandsons h. l. s. of the full paternal uncle and of the half paternal uncle by the father succeed according to the above order (see the order in 5 to 8 and 10 to 13).

Grandsons h. l. s. of the whole and half paternal uncles in order.

15. In default of the grandsons h. l. s. of the full paternal uncle and of the half paternal uncle by the father, the father's paternal uncle of the whole blood succeeds.

Father's whole paternal uncle.

16. In default of the father's whole paternal uncle, the father's paternal uncle by the same father only succeeds.

Father's half paternal uncle by the father.

17. In default of the father's paternal uncle by the same father, the son of the father's whole paternal uncle succeeds.

Son of father's whole paternal uncle.

18. In default of the son of the father's whole paternal uncle, the son of the father's half paternal uncle by the same father only succeeds.

Son of father's half paternal uncle by the father.

19. In default of the son of the father's half paternal uncle by the same father only, the grandsons h. l. s. of the father's full paternal uncle and those of the half paternal uncle by the same father only succeed according to the above order (see the order in 5 to 8, 10 to 13, and 15 to 18).

Grandsons h. l. s of father's whole and half paternal uncle by father in order.

20. In default of the grandsons h l. s. of the father's whole paternal uncle and of those of the father's half paternal uncle by the same father, the offspring of the father's great-grandfather succeeds, and in their default, the offspring of the father's great-great-grandfather succeeds, and so on, according to the above order. (See 5 to 8, 10 to 13 and 15 to 18.)

Offspring of father's great-grandfather, great great-grandfather, and so on.

Residuaries in another's right.

Residuaries in another's right.

The residuaries in another's right are four females who are originally sharers, but who lose their character of sharers and become residuaries, when there exist one or more males in the same or a lower degree: they are the daughters, son's daughters, whole sisters, and sisters by the same father only.[1]

Residuaries together with others.

Residuaries together with others.

The residuaries together with others are :—

1. Full sisters ...	When with the deceased's daughter or son's daughter (and when not excluded). See particulars about full sisters and half sisters.
2. Half sisters by father	

Residuary for special cause.

Residuary for special cause.

The residuary for special cause is the manumittor of a slave. But as slavery has been abolished by Act V of 1843, there can be no longer any heir of this description.

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[1] Of these, a daughter becomes a residuary in right of her whole brother, a son's daughter becomes so with a son's son how low so ever ; the sister of the whole blood with her own or full brother, and the sister by the same father, with her own brother; and each of these females gets half of what is taken by each of the males by whom she is rendered a residuary. But the female who was not originally a sharer, does not become a residuary with her brother, though the brother himself be a residuary heir. As in the case of paternal uncle and aunt (be the latter by the same father and mother, or by the same father only), the whole of the property goes to the uncle and not to the aunt. Such is also the case with the paternal uncle's son and daughter by the same father and mother, or by the same father only, and also with the brother's son and daughter by the same father.—Sharifiyyah, p. 41.

SECTION V.

OF DISTANT KINDRED.

Distant kindred.

THE distant kindred are all relations who are neither sharers nor residuaries. They take the property in default of the sharers and residuaries.

Four classes.

Of the distant kindred there are four classes:—

CLASS I.*

Descendants: Children of daughters and of son's daughters.

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter of No. 1
5. ~~Daughter~~ Son of No. 2.
6. Daughter of No. 2, and so on,
   how low soever, and whether male or female.
7. Son's daughter's son.
8. Son's daughter's daughter.
9. Son of No. 7.
10. Daughter of No. 7.

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* Of the individuals of the first class,—the nearest succeeds in preference to the rest; and when all the individuals are equal in the degree of relationship, then the child of an heir—whether a sharer or residuary—is preferred; but if all of them are, or none of them is, related through an heir, then a male has double the portion of a female, provided the sexes of their roots, or of ancestors in any stage, did not differ,—otherwise each, or each set, of the claimants takes the portion of *that* ancestor who differed in sex from the ancestor of any other claimant or set of claimants. For instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of the daughter of a daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.

The above is Muhammad's opinion, which is adopted in preference to that of Abu Yusuf, who holds that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants themselves, and not to the sexes of their ancestors. So according to his doctrine, in the above case, the two daughters of the daughter of a daughter's son will get two shares only (one each), and the two sons of the daughter of a daughter's daughter will get four shares (two each), two sons being equal to four daughters, and no regard being had to the sexes of their ancestors but of themselves. (1 Sircar, 140.)

11. Son of No. 8.
12. Daughter of No. 8, and so on, how low soever, and whether male or female.

CLASS 2.*

Ascendants: False grandfathers and false grandmothers.

13. Maternal grandfather.
14. Father of No. 13, father of No. 14, and so on, how high soever (*i. e.*, all false grandfathers.)
15. Maternal grandfather's mother.
16. Mother of No. 15, and so on, how high soever (*i. e.*, all false grandmothers.)

CLASS 3.†

Parents' Descendants.

17. Full brother's daughter and her descendants.
18. Full sister's son.

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* The rules for the succession of the second class of distant kindred are nearly the same as those for the first class, proximity to the deceased forming the principal ground of preference in both, and the nearer taking precedence of the more remote by whatever side related. Thus the maternal grandfather is preferred to all the others as he immediately precedes the parents of the deceased; and the father of the paternal grandmother is in like manner, preferred to the father of the paternal grandmother's mother. When the claimants are in the same degree of propinquity to the deceased, he who claims through an heir is entitled to preference. Thus the father of the mother's mother, who is a true grandmother, and therefore an heir, is preferred to the father of the mother's father, who is a false grandfather and not an heir. When the claimants have no pretensions through an heir or heirs, but are related on the same side and through persons of the same sex, then the difference is to be considered in the persons of the claimants themselves, and the distribution is made on the principle of two shares to a male and one share to a female. But if the claimants (though equal in degree and side) are related through persons of different sexes, then the property is to be divided at the stage where the difference first appears, and allotted in the manner already explained. If, on the other hand, the sides of relation differ, that is, at the earliest stage some of the claimants are related to the deceased by the father's side, and others by the mother's side, then the property is to be divided *ab initio* into three parts, whereof two are to be allotted to the claimants on the father's side, without regard to the sexes of the claimants. (1 Sircar, 141.)

† The order of succession of the distant kindred of the third class also is according to the degree of relationship and strength of consanguinty. The nearest to the deceased inherits in preference to the rest; so, of the claimants equal in relationship, the child of a residuary is preferred to the child

19. Full sister's daughters and their descendants, how low soever.
20. Daughter of half brother by father, and her descendants.
21. Son of half sister by father.
22. Daughter of half sister by father, and their descendants, how low soever.
23. Son of half brother by mother.
24. Daughter of half brother by mother and their descendants, how low soever.
25. Son of half sister by mother.
26. Daughter of half sister by mother, and their descendants, how low soever.

Class 4.*

Descendants of the two grandfathers and the two grandmothers.

27. Full paternal aunt and her descendants.†
28. Half paternal aunt and her descendants.†
29. Father's half brother by mother and his descendants.†

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of a more distant kinsman or kinswoman. But when the claimants are equal in the degree of relationship, and none is a child of a residuary, or all, or some, of them are children of residuaries, and some, of sharers, then according to Muhammad (whose doctrine, in respect of the distant kindred, is the prevalent one), the property is divided (first) with reference to the branches as well as to the sides of the roots; and then what is allotted to each set is distributed among the branches thereof, as done in the first class. Where, however, there are children of a half-brother and half-sister by the same mother only, there the division is made not with reference to the sides of their roots, but equally between the two branches, since, in the proportion of shares, there is no difference between the brothers and sisters by the same mother only, and all of them share equally. (1 Sircar, 141.)

* The succession of the distant kindred of the fourth class (which comprises the paternal uncles and aunts by the same mother only, paternal aunts, and maternal uncles and aunts) is regulated as follows :—

1. When there is only one of them, he or she inherits the whole property.
2. When they happen to be related to the deceased by the same side, preference is given to the strength of relationship, that is, the person related by both parents is preferred, whether male or female, to one connected by

† Male or female how low soever.

30. Father's half sister by mother and her descendants.*

31 Maternal uncle and his descendants.*

32. Maternal aunt and her descendants.*

Other distant kindred.

The above-named relations as well as all that are connected with the deceased through them, are his distant kindred.

Order of succession among distant kindred.

The first class of the distant kindred is first in the succession though the individual claimant should be more remote than one of another class. The second is next, then the third, then the fourth. The order of succession among the individuals of each class is according to the proximity of degree of their relationship to the deceased.

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the same father only, and this (latter) is preferred to one related only through the mother.

3. When there are male and female claimants, all equal in point of relationship, then the portion of the male is double that of the female, according to the general rule—"male has the portion of two females."

4. But when the claimants are of different sides, then no preference is given to the strength of propinquity, but two-thirds of the property go to the relatives by the father, and one-third goes to those by the mother, and the same is divided equally among the individuals of each side or or set.

The succession of the children of the distant kindred of the fourth class is, in a great measure, regulated according to the same principles as that of the distant kindred of the first class. That is, I—The nearest to the deceased, on whatever side related, is first entitled to the inheritance. II. Among the equidistant relatives all on the same side, he who has the strength of consanguinity is preferred to the rest. III—When the claim ants equidistant in relationship have equally the strength of consanguinity, then the child of a residuary is preferred to one who is not so. IV. When the claimants, though equidistant, are not related to the deceased by the same side, then no preference is given to the strength of consanguinity, nor to the circumstance of any of them being the child or or children of a residuary, but two-thirds go to the kindred related through the father, and one-third goes to those related through the mother; and where there are males and females equal in the strength of propinquity, then each male has the allotment of two females.—(1 Sircar, 143.)

* Male or female how low soever.

SECTION VI.

OF RELATIONS WHO ARE NOT HEIRS.

Relations who are not heirs.

THE natural heirs of a deceased Muhammadan, *i.e.*, the sharers, residuaries and distant kindred, are, with the exception of husband or wife, his "blood" relations, *i.e.*, his descendants, or his ancestors or their descendants; hence, the following and similar other relations are not among his natural heirs:—

Step-father, *i.e.*, mother's husband (other than the father.)

Step-mother, *i.e.*, father's wife (other than the mother.)

Step-grandmother, *i.e.*, father's step-mother.

Step-son, *i.e.*, husband's or wife's son.

Uncle's wife.

Uncle's wife's son (if not by the uncle.)

Step-brother, *i. e.*, step-mother's son not by father, &c.

SECTION VII.

OF EXCLUSION.

Two kinds of exclusion.

EXCLUSION is of two kinds:—(1) Imperfect, which is an exclusion from a larger share, and an admission to a smaller one;[1] and (2) perfect or total exclusion, by which one is at once excluded from inheritance or deprived of the whole thereof.

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[1] As for instance the shares of the husband, wife, mother, son's daughter, the sister by the same father only, &c. are respectively reduced,—(from $\frac{1}{2}$ or $\frac{1}{4}$ to $\frac{1}{4}$ or $\frac{1}{8}$) when the husband or wife succeeds with the deceased's child or son's child; (from $\frac{1}{3}$ to $\frac{1}{6}$) when the mother succeeds with the deceased's child or son's child or two brothers or sisters or one brother and one sister; (from $\frac{1}{2}$ to $\frac{1}{6}$) when the son's daughter succeeds with the deceased's daughter, (from $\frac{1}{2}$ to $\frac{1}{6}$) when a sister by the same father succeeds with a full sister. Moreover the shares of the daughter, son's daughter, full sister, and half sister by father are liable to be reduced when they are respectively made residuaries by the existence of the deceased's son, son's son, full brother and half brother by father.

Two principles of perfect exclusion.

Perfect exclusion is grounded upon two principles:—(1) Whoever is related to the deceased through any person shall not inherit while that person is living, except the mother's children (*i e.*, brothers, sisters, U. brothers and U. sisters), who inherit with her. (2) The nearest of blood inherits (1 Sircar, 287). Besides the above, person may be excluded entirely for disqualification, as a murderer.

Excluded person may or may not exclude others.

A person entirely excluded for disqualification does not at all exclude any one. But a person excluded by another, may exclude others, perfectly* as well as imperfectly. (1 Sircar, 289.)

Special cases of exclusion.

Besides the general rules above mentioned, which will, account for a great many instances of exclusion, there are several special cases which depend entirely upon authority These are sometimes at variance with the general rules of exclusion, and sometimes with the rule which places sharers. to the extent of their shares, above residuaries. Thus, a son, or son's son h. l. s., though a residuary, excludes sisters and lower son's daughters, who, in the absence of certain specified relations, are sharers; and a son's son h.l.s. excludes brothers, even though he may be farther removed from the deceased. (Rumsey, 129.)

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* *See* Particulars about grandmothers.

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Instances of total exclusion.

The following table (see Rumsey, pp. 130 and 131) presents instances of total exclusion :—

Son's son h. l. s.,	excluded by	Son, or higher son's son.
Brother	,, ...	Son, son's son h. l. s., father or (perhaps) tr. grandfather.
Sister	,, ...	Same as brother.
C. brother	,, ...	Same as brother, or brother, or sister when a residuary with another female.
C. sister	,, ...	Same as brother, or two or more sisters, or brother, or, *semble,* sister when, &c.
Son's h. l. s. daughter	,, ...	Two daughters or higher son's daughters, son, or higher son's son.
U. brother	,, ...	Child, son's h. l. s. child, father, or tr. grandfather.
U. sister	,, ...	Same as U. brother.
Tr. grandfather	,, ...	Father, or nearer tr. grandfather.
Tr. pat. grandmother	,, ...	Father, mother, intermediate tr. grandfather, or nearer tr. grandmother (even though in a different line.)
Tr. mat. grandmother	,, ...	Mother, or nearer tr. grandmother (even though in a different line.)

SECTION VIII.

OF THE RETURN.

Of the return

THE sum of the fractions that represent the shares of the sharers may be equal to, or less or more than, an *integer*, or whole number. When it is less and there is no residuary, the surplus reverts to the sharers in proportion to their shares (with the exception of the husband and wife to whom the surplus never reverts, as long as there exists any other sharer, or residuary, or distant kindred.) This is called the doctrine of Return.

SECTION IX.

OF THE INCREASE.

Of the increase.

THE Increase is the converse of Return. When in distributing the estate it is found that the sum of the shares, of the different sharers *exceeds* the whole estate, each of them must suffer a proportional deduction; or in other words, the number of parcels must be increased. Thus if the heirs be the husband, two sisters of the whole blood, two sisters by the same mother only, and the mother, their legal shares in the order they are mentioned are $\frac{1}{2}$, $\frac{2}{3}$, $\frac{1}{3}$ and $\frac{1}{6}$, which added together gives $\frac{10}{6}$; but as ten parcels cannot be paid out of six, the estate must be divided into ten shares; to the husband, three; to the two sisters of the whole blood, four; to the half sisters, two; and to the mother, one. (Elberling, s. 130.) The increase is the division of the property into a larger number of parts than that indicated by the least common denominator of the fractional shares. The rule is, to increase the L. C. D. so as to make it equal to the sum of the numerators; in other words, to the aggregate number of parts required. (Rumsey, p. 110.)

SECTION X.

OF DIVISION OF PROPERTY AMONG HEIRS.

Distribution of assets.

THE funeral expenses, debts and legacies having been paid, the remainder goes to the *persons entitled to the inheritance.* In order to find out the persons so entitled, *first* ascertain whether the deceased has left any individual or more of the classes of persons called *sharers,* and, *then,* whether any of them should be *excluded* or not. After it is ascertained which of the sharers are entitled to *get shares,*[1] divide the property among them according to their classes[2] (only half brothers and half sisters by the same mother being considered as one class), and then sub-divide the portion allotted to each class equally among the individuals contained in it. As each sharer is entitled to an arbitrary fraction of the inheritance, reduce the fractions to their equivalent ones with the least common denominator; then add together the numerators of the new fractions;(1) if the sum be equal to the L. C. D. denominator, divide the property into the number of parts equal to the L. C. D. denominator, the numerator of each new fraction will give the portion of each sharer; (2) if the sum be less, then also divide the property into the number of parts equal to the L. C. D. denominator, the numerator of each new fraction will give the portion of each sharer, as in the first case; the difference or residue being the portion of the next class of *persons entitled to the inheritance,* called residuaries, of

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[1] We say "get shares" instead of "inherit," because some might inherit as residuaries, though *excluded* from getting any *shares.*

[2] It should be borne in mind that two or more sharers of a particular class take equally among them the same portion that one of that class, if alone, would take (with some exceptions). See the section on Sharers.

whom the nearest individual or grade[1] succeeds; but if there be no residuaries, the residue will revert to the sharers in proportion to their shares, except to the husband and wife (see particulars about husband and wife); and (3) if the sum be greater, then divide the property into the number of parts equal to that sum, the numerator of each new fraction will give the portion of each sharer, as in other cases. (See the section on Increase.) In default of sharers and residuaries, the next class of *persons entitled to the inheritance* is the distant kindred. And so on. (See the order of succession.) In finding out the portions of the different individuals entitled to the inheritance, the rules of arithmetic may be profitably used in preference to the rules laid down in the Muhammadan Law Books.

CHAPTER III.

OF MARRIAGE.

Marriage is a civil contract.

MARRIAGE is merely a civil contract. It confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing, and being sued, without his consent, as if she were still unmarried. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. He may also have as many as four wives at one time. A

Powers of the husband.

[1] The residue is divided equally among residuaries in the same degree and of the same sex; but if they differ in sex, each male takes twice as much as each female. Thus, if the residuaries are three brothers' sons, each will take $\frac{1}{3}$ of the residue, whether all are sons of the same brother, all sons of different brothers, or two of them sons of one brother and one of another. And if the residuaries are two sons and three daughters, each son will take $\frac{2}{7}$, and each daughter $\frac{1}{7}$.

practice prevails in this country, which operates as a considerable check on the exercise of these powers of the husband. It is usual for Mussulmáns, even of the lowest orders, to settle very large dowers on their wives. These are seldom exacted, so long as the parties live harmoniously together; but the whole dower is payable on divorce or other dissolution of marriage, and a large part of it is usually made exigible at any time, so that a wife is enabled to hold the dower *in terrorem* over her husband; and divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich. The principal incidents of marriage are the wife's rights to dower and maintenance, the husband's rights to conjugal intercourse,[1] and matrimonial restraint, the legitimacy of children conceived, not merely born, during the subsistence of the contract, and the mutual rights of the parties to share in the property of each other at death. The right to dower is opposed to that of conjugal intercourse, and the right to maintenance opposed to that of matrimonial restraint. Hence, a woman is not obliged to surrender her person until she has received payment of so much of her dower as is immediately exigible by the terms of the contract, and is not entitled to maintenance, except while she submits herself to personal restraint.

Dower.

Incidents of marriage.

"When an invalid marriage has taken place, it is the duty of the Judge to separate the parties; and if the wife be unenjoyed, she has no claim to dower, but otherwise she is entitled to whichever may be the less—of her proper

Effects of invalid marriage.

[1] A Mussulmán husband may institute a suit in the Civil Courts in India for a declaration of his right to the possession of his wife, and for a sentence that she return to co-habitation: and the suit must be determined according to the principles of the Muhammadan Law. (11 *Moore's Indian Appeals, p.* 551. *Moonshee Buzloor Ruheem* vs. *Shumsoonnissa.*)

dower, and the dower specified, when any has been named; and when none has been named, she is entitled to the full proper dower, whatever it may be: and it is incumbent on her to observe an *iddut*,[1] which is to be reckoned from the date of the separation, according to our three masters." B. Dig., 156.

Prohibited degrees of marriage.

A man cannot lawfully marry his mother, nor his step-mother, nor his paternal or maternal grandmother, how high soever, nor his daughter, nor his granddaughter how low soever, nor his sister of the whole or half blood, nor his paternal and maternal aunts, nor those of his parents, nor the daughter of his brother or sister, whether of the whole or half blood, nor his mother-in-law, nor the daughter or granddaughter of his wife already consummated, nor the wife of his son or son's son, how low soever, nor the wife of his daughter's son, nor his foster-mother, nor any other female related, as above, by fosterage. (Sircar, 307.)

No presumption of marriage in case of prostitutes.

In considering whether a woman, once a concubine, and admittedly formerly a prostitute, has, by judicial presumption, been converted into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, the ordinary legal presumption is, that things remain in their original state. (11 *Moore's Indian Appeals, p.* 194, *Mussumat Jariut Ool Butool* v. *Mussumat Hoseinee Begum.*)

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[1] *Iddut* is the waiting for a definite period, which is incumbent on a woman after the dissolution of a rightful or semblable marriage that has been confirmed by consummation or by death (of the husband).

CHAPTER IV

OF PARENTAGE.

A CHILD born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of her husband or after divorce. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.

Child born six months after marriage.

Do. after two years of husband's death.

Acknowledgment of another as a son.

A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate, by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. (11 *Moore's Indian Appeals, p.* 94. *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan.*)

Illegitimate child, if acknowledged, acquires the status of legitimacy.

The legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation. (8 *Moore's Indian Appeals, p.* 136. *Mahomed Bauker Hoossain Khan Bahadoor* v. *Sharfoon Nissa Begum.*)

Legitimacy may be presumed.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be her husband's child, but this presumption follows the bed and is not ante-dated by relation. (11 Moore's Indian Appeals, p. 94. *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan.*)

The legal presumption in favor of a child born in his father's house of a mother lodged, and apparently treated

as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. (*14 Moore's Indian Appeals, p.* 346, *Ramamani Ammal* v. *Kulanthai Natchear.*)

Issue of a woman with two husbands.

"A man is absent from his virgin wife for years, and she marries and has children; or a woman is taken captive and married to an enemy and has children, or a woman claims to be repudiated, keeps *iddut*, marries another husband and has children; or her husband's death is announced to her, and she keeps *iddut*, marries with another and has children:—the offspring, according to Aboo Huneefa, belongs to the first, whether he deny or claim it, or whether the second deny or claim it, or the child is born within six months, or at the distance of more than two years; and the second husband may spend his *zukat* (or poor's rate) on such children, and their testimony may be received on his behalf. But Jurjanee has reported from Aboo Huneefa, that the children belong to the second husband, and that he came back to this opinion, and that the *futwa* is in accordance with it. Kazee Khan and Sirajiyyah are also to the same effect, and Sudur ool Shuheed used so to decide. Zuheer ood Deen, however, alleges that the *futwa* is for the children belonging to the first, since the child follows the bed according to *nuss*, or express authority. And if the first husband were present, and all the circumstances were the same, the child would belong to the first."[1] (B. Dig., 158.)

[1] Though it is left doubtful to which of the husbands the child belongs, yet the case is of some value as an illustration of Aboo Huneefa's opinion, that no marriage is void.

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CHAPTER V.

OF DIVORCE.

DIVORCE may be made in either of two forms; *Talâk* or *Khoola*. A divorce by *Talâk* is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But, if he adopts that course he is liable to repay her dowry, or *dynmohr*, and, as it seems, to give up any jewels or paraphernalia belonging to her. A divorce by *Khoola* is a divorce with the consent, and at the instance, of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her *dynmohr* and other rights, or make any other agreement for the benefit of the husband. A divorce by *Talâk* is not complete and irrevocable by a single declaration of the husband: but a divorce by *Khoola* is at once complete and irrevocable from the moment when the husband repudiates the wife, and the separation takes place. In these particulars the two modes of divorce differ. But there is one condition which attends every divorce, in whichever way it takes place, namely, that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her *iddit*, for her maintenance during this period.[1]

Two forms of divorce, *Talâk* and *Khoola*.

Talâk.

Khoola.

Difference between *Talâk* and *Khoola*.

Iddit.

Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of

Declaration of husband amounting to divorce.

[1] 8 Moore's I. A., p. 879, Moonshee Buzul-ul-Raheem *versus* Luteefut-oonnissa.

her father, that if she went she was his paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, it was *held* that the expression used by the husband to the wife being used with intention, constituted a divorce which become absolute if not revoked within the time allowed by the Muhammadan law. (*Hamid Ali* v. *Imtiazan*, I. L. R., 2 All. 71.)

CHAPTER VI.

OF DOWER.

Dower may be due without agreement

DOWER, though not the consideration of the marriage contract, is yet due without any special agreement, such dower being termed 'dower of the like' or 'the proper dower.'[1] But when any dower has been specified by the contract, it supersedes the proper dower, which in that case comes into operation only on the failure of the specified dower. When dower is expressly mentioned in the contract, it is usual to divide it into two parts, which are termed *Mooujjul*,[2] or prompt, and *Moowujjul*, or deferred; the prompt being immediately exigible, while the deferred is not payable till the dissolution of the marriage.[3]

Prompt or deferred dower.

If a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to co-habit with him, until he has paid her her dower, and that notwithstanding that she may have left his house

Dower if not specified.

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[1] The lowest amount of dower is ten *dirhems*. The value of the *dirhem* is not certain. Ten *dirhems* according to one account, make about six shillings and eight pence sterling. See Hidaya, Vol. i, p. 122.

[2] Prompt or exigible dower is a debt always due and demandable, and limitation runs from a clear demand and refusal thereof. 2 Law Reports, Indian Appeals, p. 235, Ranee Khajoorconissa v. Ranee Ryeesoonissa.

[3] Bail. Dig. (In.) xxvii.

without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already co-habited with consent since their marriage. (*Eidan* vs. *Marbar Husain*, I. L. R., All. 483.)

When on marriage, dower is not specified whether "prompt" or "deferred," the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered "prompt." (*Tanfik-un Nissa* v. *Ghoolum Kumbar*, I. L. R., 1 All. 506.)

Where there is no agreement on the part of the husband to pledge[1] his estate for dower, and his widow obtains actual and lawful possession of the estates under a claim to hold them as heir and for her dower, she is entitled to retain that possession until her dower is satisfied. (14 *Moore's Indian Appeals, p.* 377, *Mussamut Bebee Bechun* vs. *Sheikh Hamid Hossein.*)

A creditor of a deceased Muhammadan, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by his heir at law, whether by sale or mortgage. (5 *Law Report, Indian Appeals, p.* 211. *Syud Aazayet Hossein* vs. *Dooli Chund.*)

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[1] The widow's right to dower against the estate of her deceased husband is, generally speaking, simply in the situation of a debt which she like any other creditor can take legal measures to enforce against such property of her husband as she can find in the hands of the heirs, or even in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property. No doubt, if she is herself in possession of the property, she is entitled to assert a lien upon it in respect of her own debt against the other heirs, and to pay herself her own debt before she pays the debt of any one else. But if she is not in possession of the property, and if she is forced to take proceedings in order to liquidate the debt out of her husband's property, she is, until those proceedings have ripened into some act of Court against the property, simply in the position of an ordinary creditor.

CHAPTER VII.

OF GUARDIANS AND MINORITY.

Kinds of guardians.

GUARDIANS are either natural or testamentary. They are also near and remote. Of the former description are fathers and paternal grandfathers and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred, and their guardianship extends only to matters connected with the education and marriage of their wards. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect only where there may be no paternal kindred nor mother. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor. Under the Indian Majority Act (No. 9 of 1875), eighteen years of age is the age of minority; but minors, of whose persons or properties a guardian has been or shall be appointed by any court of justice, and every minor under the Court of Wards, shall not be deemed to have attained their majority until they shall have completed the age of twenty-one years. The acts of a minor are not lawful unless authorized by his guardian.[1]

Maternal relations are the lowest species of guardians.

Mother's right to the custody of the infant.

Mother's right forfeited on marrying a stranger.

Reverts on becoming a widow.

Paternal relation.

Age of majority.

Minor's acts not binding unless authorised by guardian.

[1] Hedayah, Vol. iii, p. 449.

CHAPTER VIII.

OF MAINTENANCE.

The liability to maintain the wife arises from marriage, which is one of the subjects to which Muhammadan law applies. The liability to maintain infant children arises from natural equity.

MAINTENANCE comprehends food, raiment and lodging, though in common parlance it is limited to the first. There are two causes for which it is incumbent on one person to maintain another—marriage and relationship. It is incumbent on a husband to maintain his wife, whether she be *mooslim* or *zimmee*, poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse. When a wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she be living in his house or with her father.[1] (B. Dig., 441.) A husband is bound to give proper maintenance to his wife or wives, provided she or they have not become refractory or rebellious, but have surrendered herself or themselves to the custody of their husbands. (1 Sircar, 447.)

Maintenance, grounds for.

Maintenance of wife.

If a woman refused to surrender herself on account of her dower, her maintenance does not drop, but it is incumbent upon the husband, although she be not yet within his custody. (1 Sircar, 448.) The maintenance of a wife is incumbent upon her husband, notwithstanding he be of a different religion. (1 Sircar, 459.)

A father is bound to support his infant children (1 Sircar, 457), only where they possess no independent property (1 Sircar 459). The maintenance of an infant child is incumbent upon the father, although he be of a different religion. (1 Sircar, 459.)

Maintenance of children.

[1] But if the husband be an infant incapable of generation, and the wife an adult, she is entitled to maintenance at his expense. (1 Sircar, 449.)

A father must maintain his female children absolutely, until they are married, when they have no property of their own. (1 Sircar, 461.)

Maintenance of son's wife.

It is incumbent on a father to maintain his son's wife, when the son is young, poor or infirm (1 Sircar, 462).

Maintenance of relations.

The Muhammadan law enjoins the maintenance of male children disabled by infirmity or disease, of parents, of grandfathers and grandmothers, of all infant male relations within the prohibited degrees if in poverty, and also of all adult male relations within the same degrees who are poor, disabled or blind. (See 1 Sircar, pp. 464 to 472.)

CHAPTER IX.

OF GIFT.

Gift defined.

A GIFT is defined to be the conferring of property without a consideration.

Three kinds of gift.

Gifts are of three kinds: (1) *Hibut* (usually pronounced *heba*), or gift without an exchange, (2) *Hiba-bil-iwaz*, or gift for a consideration, and (3) *Hiba-bashartul-iwaz*, or gift on promise of a consideration.

Acceptance and seizin necessary.

Contingent or future gift void.

Subject of gift must be in existence.

Acceptance and seizin on the part of the donee, are as necessary as relinquishment on the part of the donor. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future time. The subject of the gift must be actually in existence at the time of the donation.

Verbal gift.

Competency of donor.

A verbal gift is as effectual as that made under a writing.[1] The giver must be free, sane and adult.[2]

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[1] 2 Sircar, 2.

[2] 2 Sircar, 3.

A gift by a person, during his illness, of which he died, is lawful to the extent of one-third of his estate, provided the donee was not an heir, and he took possession in the donor's lifetime. The gift by a person in his death-illness to the extent of more than one-third of his estate can only hold good if the donor's heir or heirs *consent to it after his death*. As respects the gift to an heir by a person in his death-illness, it is not valid even to the extent of one-third of his estate, *if the rest of the heirs*[1] *do not consent to it after the donor's death*. (2 Sircar, pp. 19 and 20.)

Death-bedgift.

Gift to an heir.

Under Muhammadan law, where there is on the part of a father or other guardian a real and *bonâ fide* intention to make a gift to his ward, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be in behalf of the minor donee. (2 L. R., I. A., *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon.*)

Gift to a minor.

An undefined[2] gift of divisible property is not valid under the Muhammadan law,[3] though a sale of such property is; hence the transaction called *Hiba-bil-iwaz* has become a device for giving effect to the gift of *mooshâd*[4] in a thing susceptible of partition which may be lawfully sold, though it cannot be made the subject of gift.[5]

Undefined gift not valid.

The rule of Muhammadan law, that a gift of *mooshâd* or an undivided part in property capable of partition is invalid,

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[1] In judging whether the legatee be an heir or otherwise, regard is paid to the time of the testator's death, *not* to the period of making the will. (Hedaya, Vol. IV, p. 472.)

[2] When the gift is of a thing that may be divided without impairing any of its uses, it is further necessary that the subject of it should not be *mooshâd*, or confused with the property of another, by being held in co-partnership with the donor or a third party. When an undivided share of a thing, as a half, or a third or a fourth, is the subject of gift, there is confusion both on the side of the donor and of the donee, and the gift is unlawful or invalid. (B. Dig., Int. xxxiv.)

[3] See p. 49, Princ. 6. [4] Something confused with the property of another hence *undivided*. [5] B. Dig., (Int. xxxvi).

does not apply to definite shares of zemindaries, which are in their nature separate estates with separate and defined rents. (2 L. R. I. A., 87, *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon.*)

A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Muhammadan law to the gift of the joint and undivided property is inapplicable. (I. L. R. 2, All., 93, Jivan Baksh *v.* Imtiaz Begum.)

Revocation of gifts

Before delivery any gift may be revoked, but after delivery gifts to relatives within the prohibited degrees, or between husband and wife, do not admit of revocation. Other gifts may in general be revoked, unless there is some special cause to prevent it (B. Dig. xxxv). The causes, each of which prevents revocation of gifts, are,—(1) the loss of the thing given,(2) the passing of it from the property of the donee,(3) the death of the donor, (4) increase of the thing given,(5) a change in the subject of it,(6) the marriage relation between the donor and the donee,(7) relationship within the prohibited degrees, and (8) an exchange or return received for the gift. (2 Sircar, pp. 28—29.)

CHAPTER X.

OF SALE.

"Cases respecting sales and purchases made by the Mussulmáns in British India are almost invariably decided according to the Regulations and Acts of the present Government of the country." (1 Sircar, 493)

Sale defined.

SALE is an exchange[1] of property for property with mutual consent. When either of the things exchanged is not

[1] Much of the Muhammadan Law of Sale has fallen into disuse since the general introduction of the precious metals, as the representatives of price in contracts of exchange. (B. Dig 773.)

property, or when the thing sold, though property, has no value in law, the sale is *null*. Every thing but carrion and blood may be property. Wine and pork being forbidden to *mooslims* have no value in law. (Bail. Muhammadan Law of Sale, p. 2, 3 and 210.) Void sale.

When a person has sold land or a vineyard without mentioning 'its rights and advantages,' or 'everything small and great belonging to it,' all things erected on it for permanence enter nevertheless into the sale, such as, saplings and trees, but fruit and growing corn do not enter into the sale, on a favorable principle of construction, unless made the subject of special condition (B. Dig, p. 788). Sale of land, presumptive as to on it.

CHAPTER XI.

OF PRE-EMPTION.[1]

SHUFA or the right of pre-emption is the right to purchase property which has been sold to another by paying a price equal to that settled or paid by the purchaser. Pre-emption defined.

The principle on which the right is established is the prevention of disagreement arising from having a bad neighbour. Principle of pre-emption.

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[1] There is no right or custom of pre-emption prevalent in the Madras Presidency. (6 Mad. H. C. Rep, 26.) The existence of a local custom to the right of preemption among the Hindus of Gujerath recognized. (6 Bom. H. C. Rep., C. J., 263.) The right of pre-emption under the Muhammadan law does exist by custom among Hindus in Behar and other provinces of Western India. B. L. R., (Sup Vol.), 35; W. R., Sp, 259; see 13 W. R., (F. B.), 21; 13 W. R., 189; 17 W. R., 264. It also prevails by custom against Hindus in Jessore. 13 W. R, 124. See 5 W. R, 279; 7 W R, 210. And so in Bhagulpore. 25 W. R, 499. Not proved to prevail among Hindus of Chittagong. 1 W. R., 234; 5 W. R., 237; 9 W. R 537; nor amongst Hindus in Purneah, 11 W. R, 251. Nor between Muhammadans and Hindus in Sylhet. 1 W. R, 250. *But see* 15 W. R., 223 In districts where its existence has not been judicially noticed, the custom will be matter to be proved. B L. R (Sup. Vol.), p. 35. The right of pre-emption arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court *held* that there was no right of pre-emption. 10 B. L. R, 117. (18 W. R., 440.) The right

Pre-emption applies only to immoveable property.

The right of pre-emption, therefore, does not apply to moveable, but only to immoveable property, and can be exercised when the latter is *transferred* in any shape *for a consideration.*[1]

The right of pre-emption[2] belongs in the first place to

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of pre-emption being founded upon a rule of Muhammadan law, a Hindu purchaser is not bound by the Muhammadan law of pre-emption in favor of a Muhammadan co-partner, although he purchases from one of several Muhammadan co-partners; nor is he bound by the Muhammadan law of pre-emption on the ground of vicinage. 4 B. L R. (F. B.), 134 Where the right or custom of pre-emption prevails among Hindus, it must be presumed to be founded on, and co-extensive with, the Muhammadan law upon that subject, unless the contrary be shewn. B. L. R. (Sup. Vol.), p 35. Under s. 24, Act VI of 1871, Muhammadan law is not strictly applicable in suits for pre-emption between Muhammadans not based on local custom or contract, but it is equitable in such suits to apply that law. The application of Muhammadan law in a suit for pre-emption between a Muhammadan claimant of pre-emption and a Muhammadan vendee, on the basis of that law, is not precluded by the circumstances of the vendor not being a Muhammadan. (6 N.-W. P., H. C. Rep., 28)

[1] A transfer without consideration is not a sale to which the right of pre-emption attaches. W. R Sp., 238; 2 W. R., 78; Legal Remembrancer, 33. No right of pre-emption arises on a mere conditional sale or mortgage while any right of redemption remains in the mortgagor. (F. B.) 2 W. R., 215; 10 W R., 246. But immediately after the expiry of the year of grace, the claimant of pre-emption is bound to make his claim. 6 W. R., 116. Though the right of pre-emption does not take effect with respect to conditional sales, it takes effect with a purchase made under condition of option.—(1 Sircar, 512.) The right of pre-emption does not apply to a lease in perpetuity with a rent reserved. 8 W. R., 107; 25 W. R, 43. It also does not apply to the subject of gift, charity, inheritance or bequest. Fatawa Alamgiri, Vol. v, 249; B. Dig., 471 and 472. Nor to property made over as a hire or reward, or as a compensation for *khula* or as a dower, though it takes effect with respect to the property sold in order to pay a dower. (1 Sircar, 511)

[2] Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, *held,* that after a sale to a stranger, he could not set up his right of pre-emption. 7 B. L. R., 19. Where property is sold by public auction in execution of a decree, and the neighbour or partner has an opportunity to bid for the property as other parties present in court, the law of pre-emption cannot apply to such sales. 1 B. L. R., p. 105; 10. W. R., 165; *see also* 15 W. R., 455. A share in a mouzah having been put up for sale in the execution of a decree, and knocked down to the defendant, a stranger, the plaintiff, a co-sharer of the share, was held to be entitled, under the provisions of s. 14, Act 23 of 1861, to take the share. 6 N.-W. P., H. C. Rep, 243. But the conditions of pre-emption under the Muhammadan law do not apply to a claim brought under the section. (*Ib.*, pp. 272 and 289.) Mere possession gives no *huk shufa,* there must be ownership *(milik)* in the contiguous land. 9 W. R. 455. The Muhammadan law does not recognise the right of pre-emption in favor of a mere tenant upon the land. 8 W. R., 437. Where a plurality of persons is entitled to the privilege of pre-emption, the right of all is equa

the co-sharer[1] in the property; secondly, to a sharer[2] in the rights and appurtenances of the property; and thirdly, to a neighbour.[3]

To whom the right of pre-emption belongs.

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without reference to the extent of their shares in the property, and none is entitled to preference on the ground of being a neighbour. 3 W. R., 71; 7 W. R., 150. Where several persons purchase from one, the *shuffee* may take the proportion of any one of them; but when one purchases from several, the *shuffee* may take or relinquish the whole, but not any particular share. 10 W. R, 111. If the first *shuffee*, or claimant, by right of pre-emption, relinquish his right or claim, the second is entitled to enforce his own, and on his giving up his own right, the *shuffee* in the third degree can exercise his own right. (1 Sircar, 517.) If one of the parties (having equal rights) relinquish his own right, it devolves on the others, and is participated equally among them. (1 Sircar, 518.) Several individuals claiming upon equal ground have equal claims without regard to the extent of their several properties or rights. (1 Sircar, 518.) Where there are several persons who have together a right of pre-emption, each of them has a right in the whole, and if one of them resigns his right, the others may take the whole. (1 Sircar, 528.)

[1] One co-parcener has no right of pre-emption as against another. 6 L. C., 195 (F. B.); I. L. R., 4 Calc. F. B., 831. Where a Muhammadan offered to sell his share of certain property to a partner, and on refusal of latter to purchase the same, sold it to a stranger,—*Held*, the partner could not sue to enforce his right after the sale. 9 B. L. R., 253. The right of a shareholder to pre-emption exists whether the parcel of land sold, and in respect of which the claim is made, be large or small. 6 B. L. R., 42 (note). A partner has a right of pre-emption in villages or large estates. 6 B. L. R., (F. B.), 41. A partner, not in a house or small enclosure, but in a considerable estate, has a right to pre-emption when one of his co-sharers in such estate sells his share to a stranger. (F. B.) 14 W. R., F. B., 1; 14 W. R., 266, 365; 15 W. R., 223. In an imperfect, as in a perfect, *putteedaree* village, the sharers in each *puttee* have a preferential claim. 1 W. R., 233; 2 W. R., 10, 47; 5 W. R, 169; 10 W. R., 314; 11 W. R., 71. A partner's right of *shuffee* is not extinguished until a formal division has taken place defining each co-proprietor's share. 12 W. R., 484. Possession of a separate share, of an estate, divided by *butwarra*, gives the owner no right of pre-emption as a *shuffu khuleet* over the remaining portion. 11 W. R., 169, 215; 7 B. L R., 45 (note). *See* 15 W. R., 225; 16 W. R., 110. The term *shureek* cannot be restricted to cases in which the parties enjoy the property jointly. 13 W. R, 124. Properties having separate numbers in the Collector's rent roll are separate estates in the legal sense of the word "estates," implying such a separation as bars a claim on the ground of co-parcenary. 14 W. R., 476.

[2] A *shureek* (or partner in the substance of the thing sold) is preferred to a *shuffu khuleet* (or partner in the rights of water or way); and where plaintiff sues as *shureek*, the Court ought not to raise the issue as to whether he claims as a *shuffa khuleet*. 13 W. R., 189. *See also* 15 W. R., 225. The right of pre-emption appertains to a partner with immunities and appendages of the land, such as the right of water. 10 W. R., 314 *See* 15 W. R., 225; 17 W. R., 343. The fact of water flowing from a *dighee* over plaintiff's land to the land in dispute was held sufficient to establish plaintiff's claim as *shuffa khuleet*. 12 W. R., 162. The owner of land, through which the land in respect of which a right of pre-emption is claimed, receives

Pre-emptor should claim at once.

The person possessing the right of pre-emption should assert his claim the moment[1] he is apprized of the sale being concluded, or else his right is invalidated. Hidayah, Vol. iii, p. 569.

Tulub-moowathubut and *Tulub-ish,had.*

The *tulub-moowathubut*, or immediate demand, is first necessary; then the *tulub-ish,had*,[2] or demand with invocation; if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor, at the time of hearing of the sale, was absent from the seller, the purchaser, and the premises.

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irrigation, has a preferential right to purchase rather than a mere neighbour. 3 B. L R., (A. C.), 296.

[3] A co-parcener has a higher right than a neighbour. 16 W. R., 107. The Muhammadan law of pre-emption was never intended to apply to a case where the purchaser is not a stranger, but is either a shareholder or neighbour. 7 W. R., 260. *See* 16 W. R, 107. A claim on the ground of vicinage alone will not lie in the case of large estates, but only when either houses or small holdings of land make parties such near neighbours as to give a claim on the ground of convenience and material service 2 W. R., 261. *See also* 8 W. R., 2, 310, 413; 10 W. R, 356; 11 W. R, 251 (*affirmed by* F. B.) 14 W. R., F. B., 1; 6 B. L. R., (F. B), 41; 2 B. L. R (A. C.), 63; 6 L C., 190. The neighbour whose connection with the property is closer than that of another neighbour has a preferable right. (1 Sircar, 516)

[1] The mere fact of the pre-emptor taking a short time, before performance of the *tullub-mowthabut* (or immediate demand), for ascertaining whether the information conveyed to him was correct or not, does not invalidate his right (13 W. R, 299). The Muhammadan law allows a short time for reflection before performance of the first demand. 6 B. L. R. (A. C), 203 The delay caused by a claimant springing up from his seat to assert his right of pre-emption is not sufficient to entail forfeiture of that right. W. R., Sp., 294; 13 W. R, 259. On hearing of a sale, the pre-emptor must immediately make his demand called *tulub-mowthabut*. Where a pre-emptor, on hearing of the sale of a property to which he had a right of pre-emption, went to the property in dispute and there declared his right as pre-emptor, *held*, that such delay was fatal to his claim. 6 B. L. R., (A. C), 216. It is necessary to the enforcement of the right of pre-emption that all the prescribed formalities should be strictly complied with, 6 B. L. R, (A. C.), 171; 2 B. L. R. (A. C), 12; the preliminaries being *tullub-i-mowasibut* and *tullub i ishtahad.* 10 W. R., 119; 11 W. R., 307; *See also* 13 W. R, 177; 14 W. R., 265; 24 W. R., 462, 499.

[2] To the due performance of the ceremony of *tulub-ish,had*, it is not necessary that any particular form of words should be employed. 8 B. L. R., 455. It is essential to the performance of the *tulub-ish,had* that third persons should be formally called upon, either in the presence of the purchaser or on the land; or, if the vendor is in possession, in the presence of the vendor, to bear witness to the demand. 6 B. L. R., 165. In performing

But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other.

Words must imply claim.

It is not material in what words the claim is preferred; it being sufficient that they imply a claim.[1] (1 Sircar, 521.)

Right void *expressly* or *by implication*.

The right of pre-emption is rendered void *expressly* when the pre-emptor relinquishes in plain terms, and it is rendered void *by implication*[2] when any thing is found on the

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this ceremony, the pre-emptor must clearly declare that "he has a right of pre-emption to which he has laid claim, and that he still claims it," and invoke witnesses "to bear witness therefore to the fact." 6 B. L. R, (A. C.), 171. 2 B. L. R (A. C), 12. The personal performance of the *tulub-ish,had* depends on his ability to perform it. He may do it by means of a letter or messenger or may depute an agent, if he is at a distance and cannot afford personal attendance. 4 B. L. R. (A. C.), 139; 6 B. L. R., 167 *(note)*. See also I. L. R, 1 All., 521. W. R, Sp., 219; 12 W. R., 484. The due and sufficient observance of the formality of *tulub-ish,had*, as to time, is a question to be decided in each case by the Court which has to deal with the facts. 8 B. L. R., (F.B.) 160; 16 W. R F.B., 13. In the case of pre-emption, strict proof is necessary for the performance of the preliminaries. 6 B. L. R. (A. C.), 171; 2 B. L. R, (A C.) 12; W. R, Sp., 117, 351; Legal Remembrancer, 127; 11 W. R., 404; 17 W R., 264; 25 W. R, 12. It is essential to prove the performance of the *tullub-i-ishtahad*. W. R, Sp., 60; 8 W. R., 463; 13 W. R., 177; 14 W. R., 265; 18 W. R, 530; 22 W. R, 184. A right of pre-emption does not bind the claimant to carry money in his hand and tender it to the first purchaser (at the time of making his demand). 2 W. R., 10; 10 W. R., 211; 11 W. R, 7, 275; 22 W. R., 4. The claimant for pre-emption must make the preliminary declaration Going into his house to get the money before making the preliminary declaration, is not a compliance with the law 5 W. R, 203.

[1] Thus if a person say—"I have claimed my *shufa*," or "I *shall* claim my *shufa*," or "I *do* claim my *shufa*," all these are good; for it is the meaning, and *not* the style or mode of expression, which is here considered. Hidayah, Vol. iii, p. 570. There is some difference as to the words in which the demand should be expressed; but the correct opinion is that it is lawful in any words that intelligibly express the demand So that if he should say—"I have demanded" or "I take the mansion by pre-emption," or "do demand pre-emption," it would be lawful. But if he were to say to the purchaser "I am thy *shafi* or pre-emptor," it would be void. Fatawa Alamgiri, Vol. v, p. 267; B. Dig, pp. 481 and 482.

[2] As, for instance, when knowing the purchase, he omits, without a sufficient excuse, to claim his right; or when he makes an offer to the purchaser; or when he takes the subject of his right on hire. If the *shufi* (or pre-emptor) act as agent of the seller, and sell the house on his behalf, his right of *shufu*, is thereby invalidated; whereas if he act as agent for the *purchaser*, and purchase the house on his behalf, his right of *shufu* is not invalidated. Hidayah, Vol. iii, p. 602.

part of the pre-emptor that indicates his acquiescence in the sale. (1 Sircar, 533.) The right of pre-emption is rendered void *necessarily* when the pre-emptor has died after the two demands, and *before* taking the thing under the pre-emption. (1 Sircar, 534.) If the *shafi* previous to his getting a decree, sell the house from which he derives his right of *shufa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Hidayah, Vol. iii, pp. 601 and 602.

Right of pre-emption when void *necessarily*.

The right of pre-emption may be resumed, if the claimant had relinquished it upon misinformation of the amount or the kind of price, or of the purchaser, or of the property sold. (1 Sircar, 536.) When a pre-emptor wishes to take one part of a purchased property without another, and the part is not distinct or separate, he cannot do so. (1 Sircar, 538.) When one man purchases from one, by a single bargain, several houses in a street in which there is no thoroughfare, and the pre-emptor desires to take one of them, it has been said that if his right of pre-emption is based on partnership in the way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity; but if the right be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone. (1 Sircar, 539.)

Resumption of the right of pre emption

Pre-emptor cannot claim, one part only when not separate.

If the intermediate purchaser has made any improvements in the property, the claimant by right of pre-emption must either pay their value, or cause them to be removed. (1 Sircar, 530.)

Improvements by intermediate purchaser.

In the case of the disputed property having been deteriorated by the purchaser, the claimant is entitled to proportional deduction in the price, but when the deterioration has not been caused by the purchaser, the claimant must

Deterioration by ditto.

either pay the whole price, or resign his claim. (1 Sircar, p. 531.)

The claimant is not obliged to deposit the price in the court on preferring his claim. It is sufficient that he pays it upon his taking possession under the court's decree, but if he does not then make the payment, the purchaser (if already in possession) can retain the property until the price be paid. (1 Sircar, p. 527.)

Deposit not necessary when claim is preferred.

There are many devices by which the right of pre-emption may be easily as well as legally evaded.[1]

Devices for evading the right of pre-emption.

For fuller information on the subject of pre-emption, see Legal Companion, Vol. VI, pp. 164 *to* 230.

CHAPTER XII.

WILL.

A PERSON cannot dispose of more than a third of his property by will when he has any heir. When he has none besides the public treasury, he may dispose of the whole. Bequests are valid as far as a third of the testator's property, whether made orally or in writing. A bequest becomes vested in a legatee by his acceptance of it after the testator's death. If he rejects it, it is cancelled.

Power to dispose of a third or the whole.

Bequests may be oral or in writing.

Bequests becomes vested by acceptance.

The policy of the Muhammadan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of

Policy of the Muhammadan law regarding wills.

Policy how to be defeated.

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[1] For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property, with exception of that part (say one yard) immediately bordering on his neighbour's; and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation. (Mac., p. 48)

property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. If the gift be made without consideration, it must be accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed a seizin on the part of the donee. If the gift be for a consideration, two conditions at all events must concur, *viz.*, an actual payment of the consideration[1] on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. (3 *Law Reports, Indian Appeals,* p. 307, *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan.*)

Conditions of a valid bequest or will.

The conditions of a valid bequest or will are—(1) that the testator be competent to make a transfer of the property, (2) that the legatee be competent to receive it, and (3) that the subject of the bequest be a thing susceptible of being transferred *after* the testator's death, whether it were in existence at the time of beqeathing or not (2 Sircar, 41).

Bequest by minor void.

A bequest by a minor at any stage or age of his infancy is invalid. (2 Sircar, 54.)

Minor may ratify his bequest on attaining majority.

A bequest made by a minor becomes, however, effective *ab initio* upon his confirming or ratifying the same after attaining majority. (2 Sircar, 54.)

Will made in jest, or under compulsion or mistake.

A will made by a person in jest, or under compulsion or mistake, is not valid. (2 Sircar, 55.)

Death of legatee.

If the legatee die during the testator's lifetime, the bequest is void; because the acceptance of it is suspended upon the death of the testator. (2 Sircar, 77.)

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1 A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bonâ fide* paid. (3 L. R. I. A., p. 308.)

CHAPTER XIII.

WUKF OR ENDOWMENTS.

"In the language of the law, (according to Haneefa,) it (*wukf*) signifies the appropriation of any particular thing, in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose, in the manner of a loan. According to the two disciples "*Wukf*" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Muhammad holds it to be absolute only on the delivery[1] of it to a *Mutwallee* (or procurator), and consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term *wukf*, in its literal sense, comprehends all that is mentioned, both by Haneefa, and by the two disciples." (2 Moore's Ind. App., p. 390, *Jewan Doss Sahoo* v. *Shah Kubeer-ood-deen.*)

What is *wukf*.

Where the grant clearly appears to have been intended for charitable purposes, the property is to be considered *wukf*, notwithstanding the use of words such as "enam," "altamgha." 6 W. R. (P.C.), 3; see 20 W. R., 85; 25 W. R., 557.

To constitute a valid *wukf*, it is not sufficient that the word "*wukf*" be used in the instrument of endowment.

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1 To constitute a valid "*wukf*," it must, according to the doctrine of the *Shikhs*, be absolute and unconditional, and possession must be given of the "*mowkoof*" or thing granted. 4 N-W P, H C R, 155.

There must be a dedication of the property solely to the worship of God or to religious or charitable purposes. A Muhammadan cannot, therefore, by using the term "*wukf*," effect a settlement of property inalienable by himself and his descendants for ever. 10 Bom. H. C. R., 7.

Where a Muhammadan lady executed a deed conveying her property or trust for religious purposes, reserving to herself for life two-thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust,—*held*, that the deed must be considered invalid with respect to that portion of the income reserved by the grantor to herself for life; but as to the rest, that the deed operated as a good and valid grant. 4 N.-W. P. H. C. R., 155.

Wukf cannot be revoked.

A valid *wukf* cannot be affected by revocation or by the bad conduct of those responsible for carrying out the appropriator's behests, nor can it be alienated. 16 W. R., 116.

Wukf cannot be alienated.

Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful.[1] 2 *Hedaya*, 344.

According to Muhammadan law, *wukf* property is not alienable. 6 W. R. (P. C.), 3.

Rules of succession to *wukf*.

Where property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established, whether such rules

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1 By local custom in the Broach District, *wukf* land, or land left as a religious endowment, may be mortgaged, although such practice is contrary to Muhammadan law (1 Bom. H. C. Rep., 36).

An heritable estate burdened with a trust (as the keeping up of a saint's tomb) may be alienated subject to the trust. 10 W. R., 299. A property wholly dedicated to religious purposes cannot be sold; but where a portion only of its profits is charged for such purposes, the property may be sold subject to the charge with which it is burdened. 13 W. R., 200. See 20 W, R., 267.

are defined by writing or are to be inferred from evidence of usage.[1] (8 Mad. H. C. R., p. 63.)

Although the founder has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected, (*e.g.*, from amongst his relations,)[2] he cannot afterwards name a person as manager not answering the proper description. After the death of the founder, the right to nominate a manager of the *wukf* vests in the founder's vakils or executors, or the survivor of them for the time being. (9 Bom. H. C. R., p. 19.)

Where the *Mutwallee* of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. 13 W. R., 396.

The rule of Muhammadan law that a *Mutawallee* or superintendent of an endowment is removable for mismanagement does not apply to the case of a trustee who has a hereditary proprietary right vested in him. It is essential for the exercise by the donor of the power of removing a superintendent that such power be specially reserved at the time of the endowment. (4 Mad. H. C. R., p. 44.)

Mismanagement of *wukf*.

Mismanagement is a good ground for the interference of the Court, and although *wukf* property is not deemed a subject of inheritance, yet persons who are of the founder's kin would be entitled to sue a manager who was wasting the property, and, if qualified themselves, might

[1] Where, so far as can be gathered from usage, the mode of succession originated in the appointment of a successor by each incumbent, a court would not be authorized in finding in favor of any rule of succession by primogeniture, although the persons appointed were usually the eldest persons. (8 Mad. H C. R., p 63.)

[2] The term *Akiba* (relations), though more properly confined to relations by blood, will, when context allows that it was intended to be used in a wider sense, be extended so as to include relations by affinity. The wife or widow is not included amongst the *Akiba*. (9 Bom. H. C R, p. 19)

have a claim to succeed the disqualified person in the management, and to manage the trust in conformity with the intention of the founder. Sev., 679.

Female manager.

According to Muhammadan law, a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications (4 Mad. H. C. R., 23).

Religious office not heritable.

Land granted for the endowment of a *khatib* (office of preacher) or other religious office cannot be claimed by right of inheritance. Where such a grant has been made the members of the grantee's family have no right at his death to a division amongst them of the income derivable from the land. The right to the income of such land is inseparable from the office for the support of which the land was granted. (2 Mad. H. C. R., p. 19.)

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PRINCIPLES
OF
MOHAMMADAN LAW.

CHAPTER I.

PRINCIPLES OF INHERITANCE.

SECTION I.

GENERAL RULES.

1. There is no distinction between real and personal, nor between ancestral and acquired property, in the Mohammadan Law of Inheritance. *Property of all kinds inheritable without distinction.*

2. Primogeniture confers no superior right. All the sons, whatever their number, inherit equally. *Of primogeniture.*

3. The share of a daughter is half the share of a son, whenever they inherit together. *Of the right of a daughter, with a son.*

4. A will made in favour of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs. *Of legacies in favour of heirs.*

5. Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed. *Of debts and legacies.*

6. Slavery, homicide, difference of religion, and difference of allegiance, exclude from inheritance. *Causes of exclusion from inheritance.*

7. But persons not professing the Mohammadan faith may be heirs to those of their own persuasion: in the case of persons who are of the Mohammadan faith, difference of allegiance does not exclude from inheritance. *Exceptions.*

Simultaneous succession of a plurality of heirs.

8. To the estate of a deceased person, a plurality of persons having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally and partly descend lineally at the same time.

No right by representation.

9. The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B, and C are grandfather, father, and son. The father B dies in the lifetime of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A.

Son, son's sons, &c., have no specific allotments; but their portions vary according to the number of the other heirs.

10. Sons, son's sons, and their lineal descendants, in how low a degree soever, have no specific share assigned to them: the general rule is that they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken by each son. For instance, where there are a father, a mother, a husband, a wife, and daughters, but little remains as the portion of the sons; but where there are no legal sharers nor daughters, the sons take the whole property.

Enumeration of heirs not liable to exclusion.

11. Parents, children, husband and wife must, in all cases, get shares, whatever may be the number or degree of the other heirs.

General rule for the shares of brothers and sisters.

12. It is a general rule that a brother shall take double the share of a sister. The exception to it is in the case of brothers and sisters by the same mother only, but by different fathers.

Of sharers who are not residuary heirs.
Of sharers who are residuary heirs.

13. The portions of those who are legal sharers only, and not residuary heirs, can be stated determinately, but the portions receivable by those who are both sharers and residuaries cannot be stated generally, and must be adjusted with refer-

ence to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and under others residuaries, and in the case of fathers and grandfathers who are, under some circumstances, legal sharers only, and under others, residuaries also, the extent of their portions depends entirely upon the degree of relation of the other heirs and their number.*

SECTION II.

OF SHARERS AND RESIDUARIES.

14. The widow takes an eighth of her husband's estate where there are children or son's children, how low soever, and a fourth where there are none. Share of the widow.

15. The husband takes a fourth of his wife's estate, where there are children or son's children, how low soever, and a moiety where there are none. Share of the husband.

16. Where there is no son and there is only one daughter, she takes a moiety of the property as her legal share. Share of the daughter.

17. Where there is no son, and there are two or more daughters, they take two-thirds of the property as their legal share. Share of two or more daughters.

18. Where there is no son, nor daughter, nor son's son, the son's daughters take as the daughters—namely, a moiety is the legal share of one, and two-thirds of two or more. Share of the son's daughters.

* Daughters without sons are legal sharers, and so are sisters without brothers, but with them they become merely residuaries. Grandfathers and fathers with sons, son's sons, &c., are legal sharers, but with daughters only, they are residuaries, as well as legal sharers.

Share of the son's daughters.

19. Where there is one daughter, the son's daughters take a sixth, but where there are two or more daughters, they take nothing.

Of the same.

20. Where there is a son's son, however, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great-grandson.

Of brothers and sisters.

21. Brothers and sisters can never take any share of the property, where there is a son or son's son, how low soever, or a father or grandfather.*

Of the same.

22. Where there are uterine brothers, the sisters each take a share equal to half of what is taken by the brothers; and they being then residuaries, the amount of their shares varies according to circumstances.

Of the same.

23. In default of sons, son's sons, daughters, and son's daughters, where there is only one sister and no uterine brother, she takes a moiety of the property.

Of the same.

24. In default of sons, son's sons, daughters, and son's daughters, where there are two or more sisters and no uterine brother, they take two-thirds of the property.

Of the same.

25. Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realized their shares: such residue being half should there be only one daughter or son's daughter, and one-third should there be two or more.

Of half brothers and half sisters.

Of those by the same father only.

26. A distinction is made between the two descriptions of half brothers and half sisters. Half brothers and half sisters, who are by the same father only, can never inherit a half brother's estate while there are both brothers and sisters by

* It is the orthodox opinion that the grandfather excludes brethren of the whole blood and those by the same father only. Among the Shias, who adhere to the doctrine of the two disciples, the contrary opinion is maintained. The terms "grandfather" and "grandmother" are intended to include all ancestors, in whatever degree of ascent, between whom and the deceased no female intervenes.

the same father and mother, but those by the same mother only do inherit with brethren of the whole blood. Of those by the same mother only.

27. Where there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares. Of half sisters by the same father only.

28. Where there are two or more sisters by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take nothing. Of the same.

29. Where, however, the half sisters by the same father only, have an uterine brother, they each take a share equal to half of what is allotted to him. Of the same.

30. Among brothers and sisters by the same mother only, difference of sex makes no distinction in the amounts of the shares, contrary to the case of brothers and sisters by the same father and mother, and brothers and sisters by the same father only; but the general rule of a double share to the male applies to their issue. Brothers and sisters by the same mother only inherit equally; but the general rule of a double share for the male applies to their issue.

31. Where there is one brother by the same mother only, or one sister by the same mother only, his or her share is one-sixth, provided there are no children of the deceased, nor son's children, nor father, nor grandfather; and where there are two or more children by the same mother only, their share is one-third. Of a half brother and a half sister by the same mother. Of two or more.

32. Where there is a son of the deceased, or son's son, how low soever, the father will take one-sixth. Of the father.

33. Where there are children, or son's children, how low soever, or two or more brothers and sisters, the mother will take one-sixth. Of the mother.

34. Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share Of the same.

with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.

Of the grandfather

35 Grandfathers can never take any share of the property where there is a father.

Share of

36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth.

Of the grandmother.

37. Grandmothers can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father.

Of paternal female ancestors. Exception.

38. Paternal female ancestors, of whatever degree of ascent, are also excluded by the grandfather, except the father's mother; she not being related through the grandfather.

Share of grandmothers.

39. The share of a maternal grandmother is one-sixth, and the same share belongs to the paternal grandmother where there is no father.

Of two or more grandmothers

40. Two or three grandmothers, being of equal degree, share the sixth equally.

The nearer exclude the more distant.

41. But grandmothers, who are nearer in degree to the deceased, exclude those who are more distant.

Of false ancestors.

42. A maternal grandfather and the mother of a maternal grandfather are not entitled to any specific share, they being termed false ancestors, and not included in the number of sharers or residuaries.

SECTION III.

OF DISTANT KINDRED.

Of the first class of distant kindred.

43 Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female

ancestor, nor widow, nor husband, nor brother of the half or whole blood; nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle, nor paternal uncle's son, how low soever* (all of whom are termed either sharers or residuaries);† the daughter's children and the children of the son's daughters succeed; and they are termed the first class of distant kindred.

Of the second class.

44. In default of all those above enumerated, the grandfathers and grandmothers of that description, who are neither sharers nor residuaries, succeed; and they are termed the second class of distant kindred.

Of the third class.

45. In their default the sister's children, and the brother's daughters, and the sons of the brothers by the same mother only, succeed; and they are termed the third class of distant kindred.

Of the fourth class.

46. In their default the paternal aunts and uncles by the same mother only, and maternal uncles and aunts succeed; and they are termed the fourth class of distant kindred.

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* This enumeration is defective. It is settled law that, in default of the paternal uncle's son, how low soever, the father's paternal uncle of the whole blood succeeds, then the father's paternal uncle by the same father only, then their sons according to this order; then the offspring of the father's great-grandfather, then the offspring of the father's great-great-grandfather, and so on, according to the above order.

How the omission of the above persons in the enumeration of the residuaries occurred in the work of Macnaghten need not here be discussed. Different authors assign different causes, but all agree that Macnaghten's enumeration is defective as shown above. (*Vide* Baillie's Mahomedan Law of Inheritance, Soonee Code, pp. 44—50; Shama Churn Sircar's Mahomedan Law, Part I., pp. 129 to 132; Rumsey's Moohummudan Family Inheritance, pp. 25 to 49).

† Of the persons here enumerated the following males are legal sharers, namely, the father, the grandfather or other lineal male ancestor, the husband and the brother of the half blood by the same mother only, and the following females, namely, the daughter, the son's daughter, the widow, the mother, the grandmother, the sister by the same father and mother, the sister by the same father only, and the sister by the same mother only. The shares of these persons vary according to circumstances, and in particular instances some of them (as has been shown) are liable to exclusion altogether. The rest of the persons enumerated are residuaries only, and have no specific shares.

Of their children.

47. In their default the cousins, that is, the children of paternal aunts and uncles by the same mother only, and of maternal uncles and aunts, succeed.

Exception in the case of an enfranchised slave.

48. There is an exception to the above general rules, relative to the succession of distant kindred after residuaries. If the estate to be inherited belonged to an enfranchised slave, his manumittor and the heirs of such manumittor inherit, in preference to the distant kindred of the deceased.

Rules for the succession of the first class.

49. The rule with regard to the succession of the first class of distant kindred is, that they take according to proximity of degree, and, when equal, those who claim through an heir have a preference to those who claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equidistant in degree from the ancestor: but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir: if there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but where the sexes of the ancestors differ in any stage of the ascent, the distribution will be made with reference to such difference of sex; regard being had to the stage at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.*

For the succession of the second class.

50. The succession also, with regard to the second class of distant kindred, is regulated nearly in the same manner, by proximity, and by the condition and sex of the person

* The opinion of Abú Yúsaf is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants, and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.

through whom the succession is claimed when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one to the maternal side, without regard to the sexes of the claimants.

For the succession of the third class.

51. The same rules apply with regard to the third as to the first class of distant kindred; for instance, the brother's son's daughter and the sister's daughter's son are equidistant from the ancestor; but the former shall be preferred by reason of the brother's son being a residuary heir, and where they are equal in this respect, the rule laid down for the first class is applicable to this.

For the succession of the fourth class.

52. With regard to the fourth class all that need be said is, that (the sides of relation being equal) uncles and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only, to those by the same mother only. Where the strength of relation is also equal, as, for instance, where the claimants are a maternal uncle and a maternal aunt, of the whole blood, then the rule is, that the male shall have a share double that of the female. Where, however, one claimant is related through the father only, and the other is related through the mother only, the claimant related through the father shall exclude the other if the sides of their relation are the same; for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only; but if the sides of their relation differ—for instance, if one of the claimants be a paternal aunt by the same father and mother, and the other be a maternal aunt by the same father only, no exclusive pre-

* The rule may be thus exemplified. The claimants being a maternal grandfather and the mother of a maternal grandfather, the former, being more proximate, excludes the latter; but suppose them to be the father of a maternal grandfather and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same, and they are equal with respect to the sex of the person through whom they claim, and in this case the only method of making the distribution is by having regard to the sexes of the claimants and by giving a double share to the male.

ference is given to the former, though she obtains two shares in virtue of her paternal relation.

For the succession of their children.

53. The succession of the children of the above class, that is, the cousins, is regulated by the following rules: propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one not being an heir, without respect to the sexes of the claimants; for instance, the daughter of a paternal uncle succeeds in preference to the son of a paternal aunt—unless the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt by the same father and mother, and the son of a maternal aunt by the same father and mother, or by the same father only, claim together, the latter will not be excluded by the former; the only difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the mother's side. Should there be no difference between the strength of relation, the sides or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves.

For the succession of the descendants of their children.

54. In the distribution among the descendants of this class the same rule is applicable as to the descendants of the first class; for instance, the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same, and in case of equality in all other respects regard must be had as above, to the sexes of the claimants.*

* In considering the doctrine of succession of distant kindred, attention must be paid to the following points: First, their relative distance in degree of relation from the deceased, whether a greater or lesser number of degrees removed. Secondly, it must be ascertained whether any of the claimants are the children of heirs. If so, preference must be shown to such children. Thirdly, their strength of relation, whether they are of the half or whole blood. Fourthly, their sides of relation, whether connected

55. In default of distant kindred, he has a right to succeed whom the deceased ancestor acknowledged conditionally, or unconditionally, as his kinsman: provided the acknowledgment was never retracted, and provided it cannot be established that the person in whose favour the acknowledgment was made belongs to a different family.

Of those who succeed in default of distant kindred.

56. In default of all these, there being no will, the property will escheat to the Public Treasury; but this only where no individual has the slightest claim.

Of the public treasury.

SECTION IV.

PRIMARY RULES OF DISTRIBUTION.

57. Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by four; as in the case of a husband and an only daughter, the property is made into four parts, of which the former takes one and the latter two. The remaining fourth will revert to the daughter.

Rules where the shares are a half and a fourth.

58. Where there are two claimants, the share of one of whom is half, and of the other an eighth, the division must be made by eight; as in the case of a wife and a daughter, the property is made into eight parts, of which the daughter takes four and the wife one. The surplus three shares revert to the daughter.

A half and an eighth.

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by the father's or mother's side; and Fifthly, the sexes of the persons through whom they claim, whether male or female. With respect to this latter point, however, a difference of opinion exists; it being maintained by some authorities that *cœteris paribus* no regard should be had to the mere sex of the person through whom the claim is made, but that the adjustment should be made according to the sexes of the claimants themselves. But the contrary is the most approved doctrine. It should be recollected, too, that whenever the sides of relation differ, those connected through the father are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants.

A half, a fourth and an eighth cannot occur together.

59. No case can occur of two claimants, the one entitled to a fourth and the other to an eighth; nor of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth.

A sixth and a third.

60. Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third; as in the case of a mother and father being the only claimants, the property is made into six parts, of which the mother takes two and the father one as his legal share. The surplus three shares revert to the father.

A sixth and two-thirds.

61. Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds; as in the case of a father and two daughters being the only claimants, the property is made into six parts, of which the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father.

A third and two-thirds.

62. Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds; as in the case of a mother and two sisters, the property is made into three parts, of which the mother takes one and the two sisters two.

A sixth, a third and two-thirds cannot occur together.

63. No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds.

A half with a sixth, a third or two-thirds.

64. Where a husband inherits from his childless wife (his share in this case being one half), and there are other claimants entitled to one-sixth, one-third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six.

A fourth with a sixth, a third or two-thirds.

65. Where a husband inherits from his wife who leaves children, or a wife from her childless husband (the shares of these persons respectively in these cases being one-fourth), and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be made by twelve.

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66. Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be made by twenty-four. An eighth with a sixth, a third or two-thirds.

67. Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine, or ten. Of the increase of six.

68. Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen. Of twelve.

69. Where twenty-four is the number and it does not suit, it may be increased to twenty-seven. Of twenty-four.

SECTION V.

RULES OF DISTRIBUTION AMONG NUMEROUS CLAIMANTS.

70. Numbers are said to be *mutamásil*, or equal, where they exactly agree. Equal numbers.

71. They are said to be *mutadákhil*, or concordant, where the one number, being multiplied, exactly measures the other. Concordant.

72. They are said to be *mutawáfik*, or composite, where a third number measures them both. Composite.

73. They are said to be *mutabayin*, or prime, where no third number measures them both. Prime.

74. There are seven rules of distribution, the first three of which depend upon a comparison between the number of heirs and the number of the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs with their respective shares. Principles of distribution.

75. The first is when, on a comparison of the number of heirs and the number of shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus, First principle.

where the heirs are a father, a mother, and two daughters, the share of the parents is one-sixth each, and that of the daughters two-thirds. Here, according to principle 61, the division must be by six, of which each parent takes one, and the remaining four go to the two daughters.

Second principle.

76. The second is when, on a comparison of the number of heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mutawáfik*, or composite; as in the case of a father, a mother, and ten daughters. Here, according to principle 61, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composite, or agree in two. In this case the rule is, that half the number of such heirs, which is five, must be multiplied into the number of the original division 6: thus $5 \times 6 = 30$; of which the parents take ten, or five each, and the daughters twenty, or two each.

Third principle.

77. The third is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of shares remaining for them. This is termed *mutabayin*, or prime, as in the case of a father, a mother, and five daughters. Here also, according to principle 61 above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction and the number of shares remaining for them, they appear to be *mutabayin*, or prime. In

this case the rule is, that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus $5 \times 6 = 30$; of which the parents take ten, or five each, and the daughters twenty, or four each.

Fourth principle.

78. The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are *mutamásil*, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case, according to principle 61, the division must be by six. Here, in the first instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is four, and four compared with the number of daughters six, is *mutawáfik*, or composite, agreeing in two. The share of the three grandmothers is one-sixth, but one-sixth of six is one, and one compared with the number of grandmothers is *mutabayin*, or prime. The remaining share, which is one, will devolve on the three paternal uncles; but one compared with three is also *mutabayin*, or prime.

Then the rule is, that the sets of heirs themselves must be compared with each other, by the whole where it appears that they were *mutadákhil*, or concordant; or *mutabayin*, or prime; and by the measure where it appears that they were *mutawáfik*, or composite, and if agreeing in two, by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose cases the comparison showed a prime result. Thus $3 = 3$ and $3 = 3$, which being *mutamásil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original division. Thus $3 \times 6 = 18$; of which the daughters will take (two-thirds) twelve, or two each; the grandmothers

will take (a sixth) three, or one each; and the paternal uncles will take the remaining three, or one each.

Fifth principle.

79. The fifth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that the sets are *mutadákhil*, or concordant; as in the case of four wives, three grandmothers, and twelve paternal uncles. In this case, according to principle 65, the division must be by twelve.

Here, in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is three, and three compared with the number of wives is *mutabayin*, or prime. The share of the three grandmothers is one-sixth; but the sixth of twelve is two, and two compared with the number of grandmothers is also prime. The remaining shares, which are seven, will devolve on the twelve paternal uncles; but seven compared with twelve is also prime.

Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime, on the comparison of the several heirs with their respective shares. Thus $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied into the number of the original division. Thus $12 \times 12 = 144$; of which the wives will get (one-fourth) thirty-six, or nine each; the grandmothers (one-sixth) twenty-four, or eight each; and the paternal uncles the remaining eighty-four, or seven each.

Sixth principle.

80. The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that some of the sets are *mutawáfik*, or composite, with each other: as in the case of four wives, eighteen daughters, fifteen female ances-

tors, and six paternal uncles: in which case, according to principle 66, the original division must be by twenty-four. Here, in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth; but an eighth of twenty-four is three, and three compared with the number of wives is *mutabayin*, or prime. The shares of the eighteen daughters is two-thirds; but two-thirds of twenty-four is sixteen, and sixteen compared with the number of daughters, eighteen, is composite, and they agree in two. The share of the fifteen female ancestors is one-sixth; but a sixth of twenty-four is four, and four compared with the number of female ancestors, fifteen, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by their measure where it shows that they were composite. Thus $4 \times 2 = 9 - 1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set; because the preceding result shows that set to have been prime. Thus $15 \times 2 = 36 - 6$ and $6 = 15 - 9$ and $6 = 9 - 3$, which agreeing in three, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set; because the preceding result shows that set to have been prime. Thus $6 \times 30 = 180$, which being concordant or agreeing in six, the sixth of one number must be multiplied into the whole of the other; but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into the number of the original division. Thus $180 \times 24 = 4320$; of which the four wives will get an eighth, five

hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.

Seventh principle.

81. The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mutabayin*, or prime, and no one of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here, according to principle 66, the original division must be by twenty-four.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one-eighth; but the eighth of twenty-four is three, and three compared with the number of wives is prime. The share of the six female ancestors is one-sixth; but the sixth of twenty-four is four, and four compared with the number of female ancestors is composite, or agrees in two. The share of the ten daughters is two-thirds, and two-thirds of twenty-four is sixteen, and sixteen compared with the number of daughters is also composite or agrees in two. The remaining share, which is one, will devolve on the seven paternal uncles; but one and seven are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by the half or other measure, where it shows that they were composite. Agreeably to this rule the whole of the first set of heirs must be compared with half the second; thus $2=3-1$, which numbers being prime must be multiplied into each other. Then the result must be compared with the half of the next set, the former result having here also agreed in two. Thus $5=6-1$,

which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus $7 \times 4 = 30 - 2$ and $2 \times 3 = 7 - 1$, which being also prime, must be multiplied into each other. Thus $30 \times 7 = 210$, in which case the rule is, that this last product must be multiplied into the number of the original division. Thus $210 \times 21 = 5040$; of which the wives will take an eighth, six hundred and thirty, or three hundred and fifteen each; the female ancestors, a sixth, eight hundred and forty, or one hundred and forty each; the daughters two-thirds, three thousand three hundred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.

Rule for ascertaining the shares of different sets of heirs.

82. When the whole number of shares into which an estate should be made, has been found, the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned. There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds, the estate, according to principle 66, must be made originally into twenty-four parts, of which the widow is entitled to three, the daughters to sixteen, and there remain five to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction, must be ascertained, and $4 = 5 - 1$ being prime, the rule is (see No. 77), to multiply the number of the original division by the whole number of heirs so situated. Thus $24 \times 4 = 96$. Here, to find the shares of each set, multiply what each was originally declared entitled to, by the

number by which the aggregate of all the original portions was multiplied. Thus $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles.

Rule for ascertaining the shares of each individual of the different sets of heirs.

83. To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus $8 \times 8 = 64$, and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six.

SECTION VI.

OF THE EXCLUSION FROM AND PARTIAL SURRENDER OF INHERITANCE.

Two descriptions of exclusion.

84. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications enumerated in principle 6, or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance.

Explanation of.

In what case an entirely excluded heir partially excludes others.

85. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs either entirely or partially; but those who are excluded by reason of some intervening heir, do, in some instances, partially exclude others.

Example.

86. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel

sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only have been entitled to a sixth, although the sisters, who partially exclude her, are themselves entirely excluded by reason of the intervention of the father.

Rules where one of the heirs makes a partial surrender of his right.

87. If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here, according to principle 64, the property must be made into six shares; of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now supposing the estate left to amount to six lacks of rupees, and the husband to content himself with two, still, as far as affects the mother, the division must be made as if he had been a party, and of the remaining four lacks the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lacks as her legal share, and the remainder would go to the uncle as residuary.

SECTION VII.

OF THE INCREASE.

Definition of the increase.

88. The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.

Cases in which it takes effect.

89. It takes effect in three cases; either when the estate should be made into six shares, or when it should be made

into twelve, or when it should be made into twenty-four. See principles (67, 68, 69). One example will suffice.

Example of.

90. A woman leaves a husband, a daughter, and both parents. Here the property should be made into twelve parts, of which, after the husband has taken his fourth or three, and the parents have taken their two-sixths or four, there remain only five shares for the daughter instead of six, or the moiety to which by law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realise six shares of the property.

SECTION VIII.

OF THE RETURN.

Definition of the return.

91. The return is where there being no residuaries, the surplus, after the distribution of the shares, returns to the sharers, and the doctrine of it is as follows:

Circumstances under which it takes effect.

92. It takes effect in four cases; first, where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daughters or two sisters; in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally.

First case, example of.

Second case, example of.

93. Secondly, where there are two or more classes of sharers, unassociated with those not entitled to claim the return, as in the instance of a mother and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accordingly. Thus the mother's share being one-sixth, and the two daughters' share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

94. Thirdly, when there is only one class of sharers, associated with those not entitled to claim to return, as in the instance of three daughters and a husband, in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return his share of the inheritance (which is in this case four), and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return; but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters (three not being capable of division among six), the proportion must be ascertained between the shares and sharers. Thus $3 \times 2 = 6$, which agreeing in three, the rule is, that the number 4, into which the estate was intended to be distributed, must be multiplied by 2, that is, the measure or a third of the number of those entitled to the return. Thus $4 \times 2 = 8$, of which the husband will take two, and the daughters six, or one each; and if, on a comparison as above, the result should be prime, as in the case of a husband and five daughters, the number 4, into which it was intended to distribute the estate, must be multiplied by 5, or the whole of the number of those entitled to a return. Thus $4 \times 5 = 20$, of which the husband will take five, and the daughters fifteen, or three each. Third case, example of.

95. Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return, as in the instance of a widow, four paternal grandmothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it was susceptible, consistently with giving the person excluded from the return her share of the inheritance (which is in this case four). Then after the widow has taken her share, there remain three to be divided among the grandmothers and half sisters; but the share of Fourth case, example of.

the grandmothers is one-sixth, and of the half sisters one-third, and here, to give them their portions, the remainder should be made into six: but a third and a sixth of this number amount to three, which agrees with the number to be divided among them; of which the half sisters will take two, and the grandmothers one. Had there been only one grandmother, and only two half sisters, there would have been no necessity for any further process, as the grandmother would have taken one-third, and the two half sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half sisters nor one among the four paternal grandmothers without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $2 \times 3 = 6$, which being composite or agreeing in two, and $1 \times 3 = 4 - 1$, which being prime, the whole of one set of sharers must be compared with the half of the other. Thus $3 = 4 - 1$, which also being prime, one of the numbers must be multiplied by the other. Thus $3 \times 4 = 12$; and having found this number it must be multiplied into that of the original division. Thus $4 \times 12 = 48$, of which the grandmothers will get 12, or three each, 12 being to 48 as 1 to 4, and the half sisters 24, or 4 each, 24 being to 48 as 2 to 4, and the widow will take the remaining twelve. It is different if the shares of the persons entitled to a return do not agree with the number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grandmothers. Here the property must in the first instance be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided among the daughters and the grandmothers; but the share of the grand-

mothers is one-sixth, and of the daughters two-thirds; and here to give them their portions the property divisible among them should be made into six parts; but a sixth and two-thirds of this number amount to five, which disagrees with the number to be divided among them; in which case the rule is, that the number of shares of those entitled to a return, must be multiplied by the number into which it was necessary to make the property originally. Thus $8 \times 5 = 40$, of which the widow will take five, the daughters will take twenty-eight, and the grandmothers seven. But it is obvious that twenty-eight cannot be distributed among the nine daughters, nor seven among the six paternal grandmothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $9 \times 3 = 28 - 1$, and $6 = 7 - 1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus $6 = 9 - 3$, which being concordant, or agreeing in three, the rule is that the third of one of the numbers must be multiplied into the whole of the other. Thus $3 \times 6 = 18$; and having found this number it must be multiplied into that of the preceding result. Thus $40 \times 18 = 720$, of which the daughters will get 504, or 56 each, 504 being to 720 as 28 to 40; the grandmothers will get 126, or 21 each, 126 being to 720 as 7 to 40; and the widow will get the remaining ninety.

SECTION IX.

OF VESTED INHERITANCES.

Definition of vested inheritances.

96. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which

Rules in case of.

case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly.

Ditto.

97. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs.

Ditto.

98. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of shares into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one.

Ditto.

99. If the proportion should be concordant, or composite, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution; and the individual shares at the subsequent distribution must be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding distribution.

Example of.

100. For instance, a man dies leaving A, his wife, B and C, his two sons, and D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death

of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate. Thus $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one; but being a case of vested inheritance, it becomes necessary to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions (five at the second and forty-two at the first). Thus $10 \times 4 = 47 - 7$, and $7 = 10 - 3$, and $3 = 7 - 4$, and $3 = 4 - 1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares

at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore of the 2880 shares, the son B will get $840 + 100 + 94 = 1034$; the son C $840 + 100 + 94 = 1034$; the daughter E $420 + 50 + 47 = 517$; the mother of A 60, and the husband of D 235.

SECTION X.

OF MISSING PERSONS AND POSTHUMOUS CHILDREN.

Of missing persons.

101. The property of a mising person is kept in abeyance for ninety years. His estate in this interval cannot derive any accession from the immediate death of others, nor can any person who dies during this interval inherit from him.

Of a missing person being a coheir with others.

102. If a missing person be a coheir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case the daughters will take half the estate immediately, as that must be their share at all events; but the grandchildrên will not take any thing, as they are precluded on the supposition of their father being alive.

Of a child in the womb, there being sons.

103. Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.

Of a child in the womb, there being heirs who would succeed only on its default.

104. Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child (as would be the case, for instance, with a brother or sister), no immediate distribution of the property takes place.

105. But if those other relatives would succeed at all events to some portion (larger without than with a child, as would be the case, for instance, with a mother), the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third.

Of the same, there being heirs who would take at all events.

SECTION XI.

DE COMMORIENTIBUS.

106. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed, according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor had never existed.*

Rule of succession where two or more individuals meet with a sudden death at the same time.

* The following case may be cited as an example of this rule. A, B and C are grandfather, father, and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognised no right by representation, and sons exclude grandsons. Mr. Christian, in note to Blackstone's Commentaries (vol. ii., p. 516), notices a curious question that was agitated some time ago, where it was contended that when a parent and child perish together, and the priority of their deaths is unknown, it was a rule of the civil law to presume that the child survives the parent. He proceeds, however, to say, "But I should be inclined to think that our courts would require something more than presumptive evidence to support a claim of this nature." Some curious cases *de commorientibus* may be seen in *Causes Célèbres*, vol. iii., 412 et seq., in one of which, where a father and son were slain together in battle, and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father.

SECTION XII.

OF THE DISTRIBUTION OF ASSETS.

Of claims and assets.

107. What has preceded relates to the ascertainment of the shares to which the several heirs are *entitled;* but when the proper number of shares into which an estate should be made, may have been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, it would seldom happen that the assets exactly amount in value to ten or fifty gold mohurs or rupees. To ascertain the proper shares of the different sets of heirs and creditors in such cases, the following rules are laid down:

Rules for apportioning them.

108. When the number of shares has been found into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of assets. If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be multiplied into the number of assets, and the result divided by the number of shares into which it was found necessary to make the estate.

Where the numbers are prime.

For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain what shares of the estate left these heirs are entitled to, the above rule must be observed. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{24}$, and $400 \div 24 = 16\frac{16}{24}$, and $125 \div 24 = 5\frac{5}{24}$.

Ditto where they are composite.

109. If the numbers are composite, the rule is that the share of each set of heirs must be multiplied into the measure of the number of the assets, and the result divided by the measure of the number of shares into which it was

found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above and property to the amount of fifty rupees. Now as 24 and 50 agree in 2 the measure of both numbers is half. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 12 = 6\frac{3}{12}$, and $400 \div 12 = 33\frac{4}{12}$ and $125 \div 12 = 10\frac{5}{12}$.

And of individual heirs.

110. If it be desired to ascertain the number of shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above. For instance, in the above case the original share of each daughter was 8, and $8 \times 25 = 200$, and $200 \div 12 = 16\frac{8}{12}$.

And of creditors.

111. In a distribution of assets among creditors the rule is, that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5; and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in principle 109, it will be found that the creditor to whom the debt of sixteen rupees was due, is entitled to 14 rupees, the creditor of 5 rupees to 4 rupees 6 annas, and the creditor of 3 rupees to 2 rupees 10 annas.

SECTION XIII.

OF PARTITION.

Property Where conveniently partible should be distributed among the heirs at the desire of one or more.

112. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also where one heir claims it, provided the property admit of separation without detriment to its utility.

In other cases the distribution should not take place without the consent of all.

113. But where the property cannot be separated without detriment to its several parts, the consent of all the coheirs is requisite; so also where the estate consists of articles of different species.

Mode of distribution.

114. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the coheirs; each share should be appraised, and then recourse should be had to drawing of lots.

Of partition by usufruct.

115. Another common mode of partition is by usufruct, where each heir enjoys the use or the profits of the property by rotation; but this method is subordinate to actual partition, and where one coheir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases.

CHAPTER II.

OF INHERITANCE ACCORDING TO THE IMAMIYA, OR SHIA DOCTRINE.

1. According to the tenets of this Sect, the right of inheritance proceeds from three different sources. Three sources of the right of inheritance.

2. First, it accrues by virtue of consanguinity. Secondly, by virtue of marriage. Thirdly, by virtue of Willa.* Enumeration of them.

3. There are three degrees of heirs who succeed by virtue of consanguinity, and so long as there is any one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit. Heirs by consanguinity consist of three degrees.

4. The first degree comprises the parents, and the children, and grandchildren, how low in descent soever, the nearer of whom exclude the more distant. Both parents, or one of them inherit together with a child, a grandchild, or a great-grandchild; but a grandchild does not inherit together with a child, nor a great-grandchild with a grandchild. Enumeration of heirs of the first degree. Their relative rights.

5. This degree is divided into two classes; the roots which are limited and the branches which are unlimited. The former are the parents who are not represented by their parents; the latter are the children who are represented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased Subdivision of.

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* In a note to his translation of the Hedaya, Mr. Hamilton observes, that "there is no single word in our language fully expressive of this term. The shortest definition of it is, 'the relation between the master (or patron) and his Freedman,' but even this does not express the whole meaning." Had he proceeded to state "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.

be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

Of coheirs with children.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife.

Of the sons' and daughters' offspring.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent.

Of the second degree.

8. The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. The great-grandfather cannot inherit together with a grandfather or a grandmother; and the son of a brother cannot inherit with a brother or a sister, and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister.

Their relative rights.

Subdivision of.

9. This degree again is divided into two classes; the grand-parents and other ancestors, and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line may be extended *ad infinitum*. An individual of one class does not exclude an individual of the other, though the relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

Of the third degree.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a paternal uncle cannot inherit with a paternal uncle or a paternal aunt, nor the son of a maternal uncle with a maternal uncle or a maternal aunt.

Their relative rights.

Additional rules.

11. This degree is unlimited in the ascending and descending line, and their representatives may be extended *ad infinitum*; but so long as there is a single aunt or uncle of the

whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Enumeration of other heirs, of the third degree.

12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed, and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand-parents and great-grandparents inherit according to their degree of proximity to the deceased.

General rule relative to the half and whole blood. Exception.

13. It is a general rule that the individuals of the whole blood exclude those of the half blood who are of the same rank; but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half blood: a son of the brother of the whole blood, however, does not exclude a brother of the half blood, because they belong to different ranks: but he would exclude a son of the half brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half blood, though he does an uncle of the half blood.

Example.

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* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law for taking out letters of administration: "In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews (and the females of each class respectively), and lastly cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the Intestate." Blackstone's Com., vol. ii., p. 504.

Additional rules.

14. The principle of the whole blood, excluding the half blood, is confined also to the same rank, among collaterals: for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half blood; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half blood by the same father only, the latter of whom is excluded by the former.

Exception.

Additional rule where the sides of relation differ.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased; for instance, a paternal uncle or aunt of the whole blood does not exclude a maternal uncle or aunt of the half blood; but a paternal uncle or aunt of the whole blood excludes a paternal uncle or aunt of the half blood, and so likewise a maternal uncle or aunt of the whole blood excludes a maternal uncle or aunt of the half blood.

And where they are the same.

Additional rule where the sides differ.

16. If a man leave a paternal uncle of the half blood, and a maternal aunt of the whole blood, the former will take two-thirds in virtue of his claiming through the father, and the latter one-third in virtue of her claiming through the mother; as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt.

Further exception relative to the exclusion of the half blood.

17. The general rule, that those related by the same father and mother exclude those who are related by the same mother only, does not operate in the case of individuals to whom a legal share has been assigned.

Of uterine and half sisters.

18. If a man leave a whole sister and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole sister; and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

19. Where there are two heirs, one of whom stands in a double relation: for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle,* the former will take one-third, and the latter two-thirds, and he will be further entitled to take one half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth. Rule in case of a double relation.

20. Secondly, those who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case; and their shares are half for the husband, and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.† Of claimants by marriage.

21. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury. Of the succession of husband and wife.

22. If a sick man marry and die of that sickness without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness. Rule in case of marriage not consummated.

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* The relation of paternal and maternal uncle may exist in the same person in the following manner: A having a son C by another wife, marries B having a daughter D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half brother by the same father, and a half sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

† See Summary. [This principle is defective.]

Rule in case of divorce on deathbed.

23. If a man on his deathbed divorce his wife, she shall inherit, provided he die of that sickness within one year from the period of divorce; but not if he lived for upwards of a year.

And of reversible divorce.

24. In case of a reversible divorce, if the husband die within the period of his wife's probation, or if she die within that period, they have a mutual right to inherit each other's property.

And of irregular marriage.

25. The wife by an usufructuary, or temporary marriage, has no title to inherit.*

Of claimants by *Willa*.

26. Thirdly, those who succeed in virtue of *Willa*; but they never can inherit so long as there is any claimant by consanguinity or marriage.

Two descriptions of.

27. *Willa* is of two descriptions; that which is derived from manumission, where the emancipator, by such act, derives a right of inheritance; and that which depends on mutual compact, where two persons reciprocally engage, each to be heir of the other.

The first preferred.

28. Claimants under the latter title are excluded by claimants under the former.

General rules of exclusion.

29. The general rules of exclusion, according to this sect, are similar to those contained in the orthodox doctrine; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son, and a maternal uncle excludes a paternal grand-uncle; whereas according to the orthodox doctrine in such cases, the daughter would get only half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

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* This species of contract is reprobated by the orthodox sect, and they are both considered wholly illegal. See Hamilton's Hedaya, vol. i., pp. 71 and 72.

30. Difference of allegiance is no bar to inheritance, and homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide, to disqualify, must have been of *malice prepense.*

Difference of allegiance does not exclude, nor homicide unless wilful.

31. The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter and parents. Here the property must be divided into twelve, of which the husband is entitled to three, or a fourth; the parents to two-sixths, or four, and the daughter to half; but there remain only five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts to give the daughter her six shares; but according to the *Imamiya* tenets, the daughter must be content with the five shares that remain, because in certain cases her right as a legal sharer is liable to extinction; for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

The doctrine of the increase not admitted.

Example.

32. Where the assets exceed the number of heirs, the surplus reverts to the heirs. The husband is entitled to share in the return; but not the wife. The mother also is not entitled to share in the return, if there are brethren: and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual.

Of the return.

Privilege of primogeniture.

33. On a distribution of the estate, the elder son, if he be worthy, is entitled to his father's sword, his Koran, his wearing apparel, and his ring.

In the foregoing summary I am not aware that I have omitted any point of material importance. The legal shares allotted to the several heirs are of course the same as those prescribed in the Súní Code, both having the precepts of the Koran as their guide. The rules of distribution and of ascertaining the relative shares of the different claimants are also (*mutatis mutandis*) the same. It is not worth while to notice in this compilation the doctrines of the *Imamiya* sect on the law of contracts, or their tenets in miscellaneous matters. A Digest of their laws, relative to those subjects, was some time ago prepared, and a considerable part of it translated by an eminent Orientalist (Colonel John Baillie), by whom, however, it was left unfinished; probably from an opinion that the utility of the undertaking might not be commensurate to the time and labour employed upon it.

CHAPTER III.

OF SALE.

1. Sale is defined to be mutual and voluntary exchange of property for property. Definition of sale.

2. A contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery. How effected.

3. Sale is of four kinds; consisting of commutation of goods for goods: of money for money: of money for goods: and of goods for money; which last is the most ordinary species of this kind of contract. Four kinds of.

4. Sales are either absolute, conditional, or imperfect, or void. Four denominations of.

5. An absolute sale is that which takes place immediately; there being no legal impediment. Of an absolute sale.

6. A conditional sale is that which is suspended on the consent of the proprietor, or (where he is a minor) on the consent of his guardian, in which there is no legal impediment, and no condition requisite to its completion but such consent. Of a conditional sale.

7. An imperfect sale is that which takes effect on seizin; the legal defect being cured by such seizin. Of an imperfect sale.

8. A void sale is that which can never take effect; in which the articles opposed to each other, or one of them, not bearing any legal value, the contract is null. Of a void sale.

9. The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon; and the property may be sold for prime cost, or for more, or for less than prime cost. Of the consideration.

Of the parties.

10. It is requisite that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father or a guardian makes a sale on behalf of a minor, or where a slave purchases his own freedom by permission of his master.

Who may contract.

11. It is sufficient that the parties have a sense of the obligation they contract, and a minor, with the consent of his guardian, or a lunatic in his lucid intervals, may be contracting parties.

Postponing payment illegal.

12. In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money for goods or of goods for money, such stipulation is authorised.

Exception.

Certainty requisite.

13. It is essential to the validity of every contract of sale, that the subject of it, and the consideration, should be so determinate as to admit of no future contention regarding the meaning of the contracting parties.

Other requisite conditions.

14. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period.

Equality when requisite.

15. In a commutation of money for money or of goods for goods, if the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition.

Illegal conditions.

16. It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or for any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.

Exception.

Of option.

17. It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days.

18. When payment is deferred to a future period, it must be determinate and cannot be suspended on an event, the time of the occurrence of which is uncertain, though its occurrence be inevitable. For instance, it is not lawful to suspend payment until the wind shall blow, or until it shall rain, nor is it lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term; for instance, it is not lawful to suspend payment until the sowing or reaping time. Payment how deferrible.

19. It is not lawful to sell property in exchange for a debt due from a third party, though it is for a debt due from the seller. Sale of a debt.

20. A resale of personal property cannot be made by the purchaser until the property shall actually have come into his possession. Resale of personal property.

21. A warranty as to freedom from defect and blemish, is implied in every contract of sale. Warranty implied.

22. Where the property sold differs, either with respect to quantity or quality, from what the seller has described it, the purchaser is at liberty to recede from the contract. Where the property differs from the description.

23. By the sale of land, nothing thereon, which is of a transitory nature, passes. Thus the fruit of a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land. Sale of land.

24. Where an option of dissolving the contract has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price* agreed upon; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property. Responsibility in case of option.

25. But the condition of option is annulled by the purchaser's exercising any act of ownership, such as to take the property out of *statu quo*. Option how annulled.

Option to purchasers of unseen property.

26. Where the property has not been seen by the purchaser, nor a sample (where a sample suffices), he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even though no option may have been stipulated.

Exception.

No option to sellers.

27. But though the property have not been seen by the seller, he is not at liberty to recede from the contract (except in a sale of goods for goods), where no option was stipulated.

Exception.

Option on discovering a defect.

28. A purchaser who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect, of which he was not aware at the time of the purchase, unless while in the hands of the purchaser it received a further blemish; in which case he is only entitled to compensation.

Exception.

Rule in case of resale.

29. But if the purchaser have sold such faulty article to a third person, he cannot exact compensation from the original seller; unless by having made an addition to the article prior to the sale, he was precluded from returning it to the original seller.

Exception.

Cases in which restitution may be demanded.

30. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportional compensation.

And compensation only.

The first purchaser is on a footing with the second.

31. If a person sell an article which he had purchased, and be compelled to receive back such article and to refund the purchase-money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature.

Proviso.

32. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article or attempt to remove the defect, he shall have no remedy against the seller (unless there may have been some special clause in the contract); such act on his part implying acquiescene.

Remedy against the seller how lost.

33. It is a general rule, that if the articles sold are of such a nature as not easily to admit of separation or division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.

General rules for the right of restitution.

And those of compensation.

34. The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of prayer, are all prohibited, though they are valid.

Illegal practices.

CHAPTER IV.

OF SHUFAA, OR PRE-EMPTION.

Definition of pre-emption.

1. *Shúfaa*, or the right of pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser.

With respect to what property it does and to what it does not take effect.

2. The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated.

Additional rules.

3. The right of pre-emption takes effect with regard to property whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned.

Not restricted to any particular class.

4. The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion.

Rights and privileges of.

5. All rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption.

Who may claim pre-emption.

6. The following persons may claim the right of pre-emption in the order enumerated: a partner in the property sold, a participator in its appendages, and a neighbour.

7. It is necessary that the person claiming this right, should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witness, of such his intention, either in the presence of the seller, or of the purchaser, or on the premises. Necessary forms to be observed.

8. The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a Court of Justice.* Claim when preferrible.

9. The first purchaser has a right to retain the property until he has received the purchase-money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made. Rights of the first purchaser.

10. Where an intermediate purchaser has made any improvements to the property, the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether. Rules where the property has undergone alteration while in the possession of the first purchaser.

11. But a claimant by pre-emption having obtained possession of, and made improvements to property, is not en- Rules where the property has been im-

* Much difference of opinion prevails as to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature; otherwise a purchaser may be kept in a continual state of suspense. Ziffer and Mohammad are of opinion (and such also is the doctrine according to one tradition of Abú Yúsaf), that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right; but according to Abu Hanifa, and another tradition of Abu Yusaf, there is no limitation as to time. This doctrine is maintained in the Fatáwa Aulamgiri, in the Mohitu Saruakhsi, and in the Hedaya; and it seems to be the most authentic and generally prevalent opinion. But the compiler of the Fatawa Aulamgiri admits that decisions are given both ways.

proved by the claimant by pre-emption, and it appear to belong to a third person.

titled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller or from the intermediate purchaser (if possession had been given), and he is at liberty to remove his improvements.

Where there is a dispute as to the price paid.

12. Where there is a dispute between the claimant by pre-emption and the purchaser as to the price paid, and neither party have evidence, the assertion, on oath, of the purchaser must be credited; but where both parties have evidence, that of the claimant by pre-emption should be received in preference.

Legal devices by which a claim of pre-emption may be evaded.

13. There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when, if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation.

CHAPTER V.

OF GIFTS.

1. A gift is defined to be the conferring of property without a consideration. Definition of gift.

2. Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor. Essential conditions of.

3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period. Cannot be made to take effect *in futuro*.

4. It is necessary that a gift should be accompanied by delivery of possession, and that seizin should take effect immediately, or, if at a subsequent period, by desire of the donor. Delivery and seizin requisite.

5. A gift cannot be made of any thing to be produced *in futuro;* although the means of its production may be in the possession of the donee. The subject of the gift must be actually in existence at the time of the donation. The thing given must be actually existing at the time.

6. The gift of property which is undivided, and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previous to delivery; for delivery of the gift cannot in that case be made without including something which forms no part of the gift. An undefined gift of divisible property not valid.

7. In the case of a gift made to two or more donees, the interest of each donee must be defined either at the time of making the gift, or on delivery. Rules in case of two or more donees.

8. A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it. A gift must express, and must be entirely relinquished by the donor.

Exceptions.

9. The cases of a house given to a husband by a wife, and of property given by a father to his minor child, form exceptions to the above rule.

Of seizin by proxy.

10. Formal delivery and seizin are not necessary in the case of a gift to a trustee, having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient.

Of gift on a deathbed.

Vide Wills, p. 51.

11. A gift on a deathbed is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently no person can make a gift of any part of his property on his deathbed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest.

Resumption admissible.

12. A donor is at liberty to resume his gift, except in the following instances:

Except in certain cases.

13. A gift cannot be resumed where the donee is a relation; nor where anything has been received in return; nor where it has received any accession; nor where it has come into possession of a second donee, or into that of the heirs of the first.

Two peculiar kinds of gift.

14. Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which however more nearly resemble exchange or sale. They are technically termed *Hiba bil Iwaz*, mutual gift, or gift for a consideration, and *Hiba ba shart úl Iwaz*, gift on stipulation, or on promise of a consideration.

Of *Hiba bil Iwaz.*

15. *Hiba bil Iwaz* is said to resemble a sale in all its property; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary.

Of *Hiba ba shart úl Iwaz.*

16. *Hiba ba shart úl Iwaz*, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seizin of the donor and donee is therefore a requisite condition.

CHAPTER VI.

OF WILLS.

1. There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property which is the subject of the will be real or personal. Nuncupative and real wills equally valid.

2. Legacies cannot be made to a larger amount than one-third of the testator's estate without the consent of the heirs. Of legacies.

3. A legacy cannot be left to one of the heirs without the consent of the rest. To an heir.

4. There is this difference between the property which is the subject of inheritance and that which is the subject of legacy. The former becomes the property of the heir by the mere operation of law; the other does not become the property of the legatee until his consent shall have been obtained either expressly or impliedly. Distinction between property acquired by inheritance and by will.

5. The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance. Legacies precede claims of inheritance.

6. All the debts due by the testator must be liquidated before the legacies can be claimed. And debts precede legacies.

7. An acknowledgment of debt in favour of an heir on a deathbed resembles a legacy; inasmuch as it does not avail for more than a third of the estate. Acknowledgment of a debt to an heir.

8. It is not necessary that the subject of the legacy should exist at the time of the execution of the will. It is sufficient for its validity that it should be in existence at the time of the death of the testator. Of the subject of a legacy.

9. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law. Of illegal provisions.

Special rule relative to legatees.

10. A person not being an heir at the time of the execution of the will, but becoming one previous to the death of the testator, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will.

A legacy may be retracted by implication.

11. If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annulled; so also if he sell or give the legacy to any other individual; even though it may have reverted to his possession before his death, as these acts amount to a retractation of the legacy.

Rule in case of excessive legacies.

12. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.

And of different legacies to the same person.

13. Where a legacy is left to an individual, and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect.

And of the same legacy to two individuals.

14. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining moiety will devolve on the heirs; so also in the case of an heir and stranger being left joint legatees.

Of executors.

15. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors.

Should be Mohammadans.

16. A Mohammadan should not appoint a person of a different persuasion to be his executor, and such appointment is liable to be annulled by the ruling power.

17. Executors having once accepted cannot subsequently decline the trust. Cannot resign.

18. Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, and where benefit to the estate must certainly accrue. Rule where there are two.

CHAPTER VII.

OF MARRIAGE, DOWER, DIVORCE, AND PARENTAGE.

Definition of marriage.

1. Marriage is defined to be a contract founded on the intention of legalizing generation.

Essentials of.

2. Proposal and consent are essential to a contract of marriage.

Conditions of.

3. The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio;* for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also necessary that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract, and that the proposal and acceptance should be made at the same time and place.

Competency of witnesses to.

4. There are only four requisites to the competency of witnesses to a marriage contract; namely, freedom, discretion, puberty, and profession of the Músalmán faith.

Special rules regarding them.

5. Objections as to character and relation do not apply to witnesses in a contract of marriage as they do in other contracts.

Proposal may be made by agency, or by letter.

6. A proposal may be made by means of agency, or by letter; provided there are witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it was addressed.

7. The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance,* and habitation; to create between the parties, prohibited degrees of relation and reciprocal right of inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife, and to invest the husband with a power of correction in cases of disobedience. Effect of the contract.

8. A freeman may have four wives, but a slave can have only two. Number of wives.

9. A man may not marry his mother, nor his grandmother, nor his mother-in-law, nor his step-mother, nor his step-grandmother, nor his daughter, nor his grand-daughter, nor his daughter-in-law, nor his grand-daughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse. Enumeration of prohibited relations.

10. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as that, if one of them had been a male, they could not have intermarried. Additional prohibitions.

11. Marriage cannot be contracted with a person who is a slave of the party; but the union of a freeman with a slave, not being his property, with the consent of the master of such slave, is admissible, provided he be not already married to a freewoman. Of freemen and slaves.

12. Christians, Jews, and persons of other religions, believing in one God, may be espoused by Mohammadans. Of the religion of the parties.

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* The right of a wife to maintenance is expressly recognized: so much so, that if the husband be absent, and have not made any provision for his wife, the Law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

Presumption of marriage.

13. Marriage will be presumed, in a case of proved continual cohabitation, without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at all nuptials.

Capacity to contract.

14. A woman having attained the age of puberty, may contract herself in marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be equal.

Right of guardians.

15. If the match be unequal, the guardians have a right to interfere with a view to set it aside.

Where an infant contracts.

16. A female not having attained the age of puberty cannot lawfully contract herself in marriage without the consent of her guardians, and the validity of the contract entirely depends upon such consent.

Limitation.

17. But in both the preceding cases the guardians should interfere before the birth of issue.

Contract when dissoluble by the parties.

18. A contract of marriage entered into by a father or grandfather, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence.

Of guardians for marriage.

19. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians, the Government may supply their place.

Of dower.

Minimum of.

20. A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten dirms,* and it becomes due on the consummation

* The value of the dirm is very uncertain. Ten dirms, according to one account, make about six shillings and eight pence sterling. See note to Hamilton's translation of the Hedaya, p. 122, vol. i.

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of the marriage (though it is usual to stipulate for delay as to the payment of a part) or on the death of either party or on divorce. When due.

21. Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family. Where no amount fixed.

22. Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand. Whether prompt or deferred.

23. It is a rule that whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule: for instance, a man may marry his sister's foster-mother, or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister. Disqualification of fosterage and consanguinity. Exceptions.

24. A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause; but before the divorce becomes irreversible, according to the more approved doctrine, it must be repeated three times, and between each time the period of one month must have intervened, and in the interval he may take her back either in an express or implied manner. Of the rules of divorce.

25. A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual and separated from him either by death or divorce; but this is not necessary to a re-union, if she have been separated by only one or two divorces. Conditions precedent to re-union.

26. If a husband divorce his wife on his deathbed, she is nevertheless entitled to inherit, if he die before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage. Of a deathbed divorce.

What amounts to a divorce.

27. A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.*

Of divorce purchased.

28. A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

Another mode of divorce.

29. Another mode of separation is by the husband's making oath, accompanied by an imprecation as to his wife's fidelity, and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardized.

Of impotency.

30. Established impotency is also a ground for admitting a claim to separation on the part of the wife.

Rules relative to parentage.

31. A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of her husband or after divorce.

Relative to the children of a female slave.

32. The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise: but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.

Of acknowledgment of parentage.

33. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.

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* There is recognized a species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar*.—Hedaya, book iv., chap. ix.

CHAPTER VIII.

OF GUARDIANS AND MINORITY.

1. All persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period. Term of minority.

2. There is a subdivision of the estate of minority, though not so minute as in the Civil Law, the term minor being used indiscriminately to signify all persons under the age of puberty; but the term *Sabi* is applied to persons in a state of infancy, and the term *Múrahik* to those who have nearly attained puberty.* Subdivision of.

3. Minors have not different privileges at different stages of their minority, as in the English law.† Of their privileges.

4. Guardians are either natural or testamentary. Of guardians.

5. They are also near and remote. Of the former description are fathers and paternal grandfathers and their executors and the executors of such executors. Of the latter descrip- Of the same.

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* The great distinction was therefore into majors and minors; but minors were again subdivided into *Puberes* and *Impuberes;* and *Impuberes* again underwent a subdivision into *Infantes* and *Impuberes.*"—Summary of Taylor's Roman Law, p. 124. In the Mohammadan Law a person after attaining majority is termed *Shab* till the age of thirty-four years; he is termed *Kohal* until the age of fifty-one, and *Sheikh* for the remainder of his life.

† The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor, and at twenty-one is at his own disposal, and may alienate his lands, goods, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to a dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executress; and at twenty-one may dispose of herself and her lands.—See Blackstone's Com., vol. i., p. 463.

tion are the more distant paternal kindred, and their guardianship extends only to matters connected with the education and marriage of their wards.

Powers of near guardians.

6. The former description of guardians answers to the term of curator in the Civil Law, and of manager in the Bengal Code of Regulations; having power over the property of a minor for purposes beneficial to him; and in their default this power does not vest in the remote guardians, but devolves on the ruling authority.

Guardianship of maternal relations.

7. Maternal relations are the lowest species of guardians' as their right of guardianship for the purposes of education and marriage takes effect only where there may be no paternal kindred nor mother.

Duration of mother's control.

8. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty.

Special rules.

9. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow.

Right of the paternal relations.

10. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor.

Of necessary debts.

11. Necessary debts contracted by any guardian for the support or education of his ward must be discharged by him on his coming of age.

Disqualifications of a minor.

12. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make a loan, or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.

Competency of.

13. But he may receive a gift, or do any other act, which is manifestly for his benefit.

14. A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances, viz., 1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will which cannot be carried into effect without such sale; 5thly, where the produce of the property is not sufficient to defray the expenses of keeping it; 6thly, where the property may be in danger of being destroyed; 7thly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Of his immoveable property.

Exceptions.

15. Every contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his personal property, is valid and binding upon him; provided there be no circumvention or fraud on the face of it.

Of his personal property.

Exception.

16. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others, though they are not liable in criminal matters to retaliation or to the *ultimum supplicium*, but they are liable to discretionary chastisement and correction.

Responsibility of.

CHAPTER IX.

OF SLAVERY.

Of legal slavery.

1. There are only two descriptions of persons recognized as slaves under the Mohammadan Law. First, infidels made captive during war; and secondly, their descendants. These persons are subjects of inheritance, and of all kinds of contracts, in the same manner as other property.

Slavery entire or qualified.

2. The general state of bondage is subdivided into two classes, and slavery may be either entire or qualified, according to circumstances.

Of qualified slaves.

3. Qualified slaves are of three descriptions: the *Múkátib*; the *Múdabbir*, and the *Um-i-walad*.

Of a *Múkátib* slave.

4. A *Múkátib* slave is he between whom and his master there may have been an agreement for his ransom, on the condition of his paying a certain sum of money, either immediately, or at some future time, or by instalments.

Rules relative to.

5. If he fulfil the condition, he will become free; otherwise he will revert to his former unqualified state of bondage. In the meantime his master parts with the possession of, but not with the property in him. He is not, however, in the interval a fit subject of sale, gift, pledge, or hire.

Of a *Múdabbir* slave.

6. A *Múdabbir* slave is he to whom his master has promised *post-obit* emancipation; such promise, however, may be made absolutely, or with limitation; in other words, the freedom of the slave may be made to depend generally on the death of his master, whenever that event may happen: or it may be made conditionally, to depend on the occurrence of the event within a specified period.

7. This description of slave is not a fit subject of sale or gift, but labour may be exacted from him and he may be let out to hire, and in the case of a female she may be given in marriage. Where the promise was made absolutely, the slave becomes free on the death of the master, whenever that event may happen; and, where made conditionally, if his death occurred within the period specified. Rules relative to.

8. The general law of legacies and debts is applicable to this description of slaves, they being considered as much the right of heirs as any other description of property: consequently they can only be emancipated to the extent of one-third of the value of their persons, where the master leaves no other property; and they must perform emancipatory labour for the benefit of the heirs to the extent of the other two-thirds; and where the master dies insolvent, they do not become free until, for the benefit of the deceased's creditors, they have earned by their labour property to the full amount of their value. Exceptions to the above general rules.

9. An *Um-i-walad* is a female slave who has borne a child or children to her master. Of an *Um-i-walad.*

10. The law is the same regarding this description of slave as regarding the *Múdabbir*, with this difference in her favour, that she is emancipated unconditionally on the death of her master; whether he may or may not have left other assets, or whether he may have died in a state of insolvency or otherwise. But it should be observed that the parentage of such slave is not established in her master unless he acknowledge the first born. Rules relative to.

11. Slaves labour under almost every species of incapacity. They cannot marry without the consent of their masters. Their evidence is not admissible, nor their acknowledgments (unless they are licensed) in matters relative to property. They are not generally eligible to fill any civil office in the Disqualifications of slaves.

State, nor can they be executors, sureties, or guardians (unless to the minor children of their masters by special appointment); nor are they competent to make a gift or sale, nor to inherit or bequeath property.

Indulgences granted.

12. But, as some counterpoise to these disqualifications, they are exempted from many obligations of freedom. They are not liable to be sued except in the presence of their masters; they are not subject to the payment of taxes, and they cannot be imprisoned for debt. In criminal matters the indulgences extended to them are more numerous.

Of licensed slaves.

13. Any description of slave, however, may be licensed, either for a particular purpose or generally for commercial transactions; in which case they are allowed to act to the extent of their license.

Rules relative to the marriage of.

14. Masters may compel their slaves to marry. Unqualified slaves may be sold to make good their wives' dower and maintenance, and qualified slaves may be compelled to labour for the same purposes. A man cannot marry a female slave so long as he has a free wife; nor can he under any circumstances marry his own slave girl, nor can a slave marry his mistress.

Slavery of relations prohibited.

15. Persons who stand reciprocally related within the prohibited degrees cannot be the slaves of each other.

Of the issue of slaves.

16. Where issue has been begotten between the male slave of one person and the female slave of another, the maxim of *partus sequitur ventrem* applies, and the former has no legal claim to the children so begotten.

Question as to a person's selling himself into slavery.

17. It is a question how far the sale of a man's own person is lawful when reduced to extreme necessity. It is declared justifiable in the *Mohít-ú-sarakhsí*, a work of unexceptionable authority. But while deference is paid to

that authority, by admitting the validity of the sale, it is nevertheless universally contended that it should be cancelled on the application of the slave, and that he should be compelled by his labour to refund the value of what he had received from his purchaser.

Of servitude.

18. It is admitted however by all authorities that a person may hire himself for any time, even though it amount to servitude for life; but minors so hired may annul the contract on attaining majority.

CHAPTER X.

OF ENDOWMENTS.

Definition of an endowment.

1. An endowment signifies the appropriation of property to the service of God; when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind.

Rules relative to.

2. An endowment is not a fit subject of sale, gift, or inheritance; and if the appropriation is made *in extremis*, it takes effect only to the extent of a third of the property of the appropriator. Undefined property is a fit subject of endowment.

Sale of—when allowable.

3. Endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices or other indispensible purposes, and where the object cannot be attained by farming or other temporary expedient.

Grant of—to a person not in existence.

4. In case of the grant of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant would nevertheless be valid, and the profits of the endowment will be distributed among the poor.

Superintendent of—not removable *quamdiu se bene gesserit.*

5. The ruling power cannot remove the superintendent of an endowment appointed by the appropriator, unless on proof of misconduct; nor can the appropriator himself remove such person, unless the liberty of doing so may have been specially reserved to him at the time of his making the appropriation.

6. Where the appropriator of an endowment may not have made any express provision as to who shall succeed to the office of superintendent on the death of the person nominated by himself, and he may not have left an executor, such superintendent may, on his deathbed, appoint his own successor, subject to the confirmation of the ruling power. Of the succession to.

7. The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be derivable from the exchange; nor should endowed lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment. Rules relative to the management of.

8. The injunctions of the appropriator should be observed except in the following cases: If he stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removeable by them on proof of misconduct. If he stipulate that the appropriated lands shall not be let out to farm for a longer period than one year, and it be difficult to obtain a tenant for so short a period, or, by making a longer lease, it be better calculated to promote the interests of the establishment, the ruling authorities are at liberty to act without the consent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the mosque, it may nevertheless be distributed in other places and among the necessitous, though not beggars. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear Cases in which the will of the founder may be contravened.

deserving of it, and the endowed property may be exchanged, when it may seem advantageous, by order of such authorities; even though the appropriator may have expressly stipulated against an exchange.

Case of two superintendents.

9. Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent.

General rule for public and private endowments.

10. Where an appropriation has been made by the ruling power, from the funds of the public treasury, for public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private appropriations, with the exceptions above mentioned, the injunctions of the founder should be fulfilled.

CHAPTER XI.

OF DEBTS AND SECURITIES.

1. Heirs are answerable for the debts of their ancestors, as far as there are assets. Responsibility of heirs.

2. The payment of debts acknowledged on a deathbed must be postponed until after the liquidation of those contracted in health, unless it be notorious that the former were *bonâ fide* contracted; and a deathbed acknowledgment of a debt in favour of an heir is entirely null and void, unless the other heirs admit that it is due. Of debts acknowledged on a deathbed.

3. If two persons jointly contract a debt, and one of them die, the survivor will be held responsible for a moiety only of the debt; unless there was an express stipulation that each should be liable for the whole amount: for the law presumes that each were equal participators in the profits of the loan, and that one should not be responsible for the share of advantage acquired by the other. Case of two persons jointly contracting a debt.

4. So also where two persons are joint sureties for the payment of a debt, if one of them die, the survivor will not be considered as surety for the whole, and that the one should be surety for other. And being joint sureties.

5. It is different where two partners are engaged in traffic, contributing the same amount in capital, and being equal in all respects, in which case the one partner is responsible for all acts done and for all debts contracted by the other. But this is not the case with regard to other partnerships, in which case a creditor of the concern cannot claim the whole debt from any one of the partners severally, but must either come upon the whole collectively, or if he prefer his claim against any one individual partner, it must be only to the extent of his share. In certain cases partners are jointly and severally responsible.

Of necessary debts contracted by guardians.

6. Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age.

Inhibition of debtors.

7. A general inhibition cannot be laid on a debtor to exclude him entirely from the management of his own affairs; but he may be restrained from entering into such contracts as are manifestly injurious to his creditor.

Proof of debt by confession and by evidence.

8. If a debtor, on being sued, acknowledge the debt, he must not be immediately imprisoned; but if he deny, and it be established by evidence, he should be committed forthwith to jail.

Case of procrastinating debtors.

9. If, after judgment, there should be any procrastination on the part of a debtor who has been suffered to go at large, and he may have received a valuable consideration for the debt, or if it be a debt on beneficial contract, he should be committed to jail, notwithstanding he plead poverty.

Special rule in certain cases.

10. But if the debt had been contracted gratuitously, and without any valuable consideration having been received (as in the case of a debt contracted by a surety on account of his principal), the debtor should not be imprisoned unless the creditor can establish his solvency.

Imprisonment how determinable.

11. It is left discretionary with the judicial authorities to determine the period of imprisonment in cases of apparent insolvency.

Liberation no bar to subsequent arrest.

12. But the liberation of a debtor does not exempt him from all future pursuit by his creditors. They may cause his arrest at a subsequent period, on proof of his ability to discharge the debt.

Of attachment and sale.

13. In the attachment and sale of property belonging to a debtor, great caution is prescribed. In the first place, his money should be applied to the liquidation of his debt; next, his personal effects; and, last of all, his houses and lands.

14. There is no distinction between mortgages of lands and pledges of goods. Of mortgages and pledges.

15. Hypothecation is unknown to the Mohammadan Law, and seizin is a requisite condition of mortgage. Of hypothecation.

16. The creditor is not at liberty to alienate and sell the mortgage or pledge at any time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited. Of mortgages.

17. It is a general rule that the pawnee is chargeable with the expense of providing for the custody, and the pawner with the expense of providing for the support of the thing pledged; for instance, in the case of a pledge of a horse, it is necessary that the pawner should provide his food, and the pawnee his stable. Obligations of mortgagers and mortgagee.

18. Where property may have been pawned or mortgaged in satisfaction of a debt, it is not lawful for the pawnee or mortgagee to use it without the consent of the pawner or mortgager, and if he do so, he is responsible for the whole value. Mortgagee cannot use the pledge.

19. Where such property, being equivalent to the debt, may have been destroyed otherwise than by the act of the pawnee or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee or mortgagee is not responsible for the excess, but where it falls short of the debt, the deficiency must be made up by the pawner or mortgager; but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt. Mortgage destroyed in the mortgagee's hands.

20. If a person die, leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all the other creditors. Privilege of a mortgagee.

CHAPTER XII.

OF CLAIMS AND JUDICIAL MATTERS.

No limitation.

1. There is no rule of limitation to bar a claim of right according to the Mohammadan Law.*

Parole and writing equally valid.

2. A claim founded on a verbal engagement is of equal weight with a claim founded on a written engagement.

Of informal deeds.

3. Informality in a deed does not vitiate a contract founded thereon, provided the intention of the contracting parties can otherwise be clearly ascertained.

Of priority.

4. The general rule with respect to all claims is that priority in point of time confers superiority of right.

Conflicting claims of purchase and gift.

5. Where the priority of either cannot be ascertained, a claim founded on purchase is entitled to the preference over a claim founded on gift.

Contracts generally devolve.

6. Contracts are not dissolved generally by the death of one of the contracting parties, but they devolve on the representatives as far as there are assets; unless the subject of the contract be of a personal nature, such for instance, as in the case of a lease, if either the landlord or the farmer die, the contract ceases on the occurrence of that event.

Exceptions.

Additional exception.

7. So also in the case of partnership and joint concerns of any description, where the surviving partners are not bound to continue in business with the heirs of the deceased partner, and *vice versâ*: and the obligation is extinguished, as well by civil as by natural death.

Of witnesses.

8. Oaths are not administered to witnesses.

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* In the *Bahr-ú-rayik* an opinion is cited from the Mabsút, to the effect that if a person causelessly neglect to advance his claim for a period of thirty-three years, it shall not be cognizable in a court of justice; but this opinion is adverse to the received legal doctrine.

9. In civil claims the evidence of two men, or one man and two women, is generally requisite. Their number.

10. Slaves, minors, and persons convicted of slander, are not competent witnesses. Incompetent witnesses.

11. The evidence of a father or grandfather, in favour of his son or his grandson, and *vice versâ*; of a husband in favour of his wife, and *vice versâ*, and of a servant in favour of his master, and *vice versâ*, is not admissible. Inadmissible evidence.

12. Nor is the evidence of a partner admissible in matters affecting the joint concern. Of the same.

13. In matters which fall peculiarly within the province of women, female evidence is admissible, uncorroborated by male testimony. Female evidence where admissible.

14. Hearsay evidence is admissible to establish birth, death, marriage, cohabitation, and the appointment of a Kazí; as the eye-witnesses to such transactions are frequently not forthcoming. And hearsay evidence.

15. No respect is paid to any superiority in the number of witnesses above the prescribed number adduced in support of a claim. Superfluous evidence.

16. The evidence of witnesses which tends to establish the plaintiff's claim to any thing not contained in his own statement, must be rejected; for instance, if any of his witnesses depose to a larger sum being due to him than that claimed by himself.

17. The evidence of witnesses which tends to establish the plaintiff's claim on a ground different from that alleged by himself, must be rejected; for instance, if the plaintiff were to claim by purchase, and his witnesses were to depose to his claim being founded on gift.

18. Where a debt is claimed, and some of the witnesses depose to the debt of the whole sum claimed and others to a part of it only, the plaintiff is entitled to such part only of the sum claimed. Where it differs as to the amount due.

Of the general issue.

19. Where a defendant pleads the general issue, the *onus probandi* rests on the plaintiff.

Of a special plea containing defensive matter.

20. Where a plea contains defensive matter, such as payment or satisfaction, the *onus probandi* rests on the defendant; the rule being the same as in the Civil Law, that in every issue the affirmative is to be proved.

Of the junction of a special plea and the general issue.

21. A defendant may in some cases plead both the general issue and a special plea, where they are not inconsistent; and the *onus probandi* in such case rests on the plaintiff, where the special plea is not necessary to the defence; for instance, a man sues another for half an estate, alleging that he was born in wedlock of the same father and mother as the defendant. Here the defendant may deny the allegation generally, and at the same time plead that the defendant was born of a different family.

A claim at variance with a former one inadmissible.

22. A claim is not admissible which may be repugnant to a former claim, both of which cannot stand; for instance, a person in a former suit having denied that a certain individual was his brother, cannot subsequently claim the inheritance of that person on the plea of such relation.

Unless they can both consistently stand.

23. But if the claim be at variance with a former one, and they can both consistently stand, it is admissible; for instance, a claim having been advanced to property in virtue of purchase, the same property may be claimed by the same person in virtue of inheritance, but if the claim of inheritance had been prior, a subsequent claim of purchase is not admissible; as it is manifest that they cannot both consistently stand.*

* At first sight there might appear to be a distinction without a difference in this case; but the reason of the rule is that an heir might consistently make a purchase of property which had not devolved, but of which he was in expectancy But it is contrary to all probability that he should have purchased, after the demise of the ancestor, property to which he had represented himself actually entitled in virtue of inheritance.

24. If a man adduce a claim, and have no evidence to support it, the general rule is, that the defendant must be put to his oath, and if he decline swearing, judgment should be given for the plaintiff; but if he deny on oath, he is absolved from the claim.

Rule where the plaintiff has no evidence.

25. Where both parties have evidence, that of the plaintiff is generally entitled to preference. Thus, for instance, where the creditor and debtor are at issue as to the amount of a debt, and both parties have evidence, that of the former is entitled to preference; but where neither party has evidence, the assertion on oath of the latter is to be credited.

And where both parties have evidence.

Examples.

26. It is also a general principle that where there is evidence adduced on both sides, *cæteris paribus*, the preference should be given to the witnesses of the party whose claim is greater, or who has the greater interest in the subject-matter. Thus, for instance, in an action arising out of a contract of sale, where there is a disagreement about the price between the seller and purchaser, both parties having evidence, the witnesses who depose to the larger sum being due, that is of the plaintiff, are entitled to preference.

Additional rule where both parties have evidence.

Example.

27. And where there is a disagreement, both as to the price and goods, both parties having witnesses, the evidence adduced by the seller is entitled to preference as far as it affects the amount of price, and that of the purchaser as far as it affects the quality and quantity of the goods.

Case of sale, the parties being at issue both as to the price and the goods, and each having evidence.

28. If neither party have evidence, they should both be put to their oaths, and if both consent to swear, the contract must be dissolved; but if one decline, and the other swear, the decree should be passed in favour of the swearer.

And where neither has evidence.

29. But if the disagreement exist with respect to the conditions only of a sale, such as the period of payment, &c., and both parties consent to swear, the assertion on oath of the party against whom the claim is made is entitled to preference.

And where they are at issue as to the condition of a sale.

Suit between husband and wife, or between lessor and lessee.

30. Where a husband and wife dispute as to the amount of dower, both parties having evidence, that of the wife must be credited, as it proves most;* so also in a dispute between a lessor and lessee, the evidence of each party is entitled to preference as far as their individual interests are at stake; the evidence of the lessor being received as to the amount of the rent, and that of the lessee as to the duration of the term.

Claim of property in deposit or in pledge.

31. Where property is claimed, and the person in whose possession it is states that he is merely a depository or a pawnee of an absent proprietor, and adduces evidence in support of his assertion, the claim must be dismissed; but the claim should be rejected *in limine* where the claimant admits his title to have been derived from such absentee proprietor.

Of *ex-parte* judgment.

32. Judgment cannot be passed *ex-parte*, the reason given being, that decisions must be founded either on the defendant's confession, or (notwithstanding his denial) on proof by witnesses; and where he is absent, it cannot be said whether he would have denied or admitted the claim.

Of arbitration.

33. When cases are referred to arbitration, it is requisite that the decision of the arbitrators should be unanimous.

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* But there is an exception to this general rule. If the proper dower of the wife, that is to say the average rate of dower paid to her paternal female relations, exceed the amount claimed by her, the evidence adduced by the husband is entitled to preference, because that goes to prove some remission on her part. See Hedaya, vol. i., p. 154.

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STATUTES RELATING TO MOHAMMADAN LAW.

21 GEO. III., c. 70, s. 17.

How the Supreme Court shall determine actions between Mahomedan and Gentu inhabitants of Calcutta.

XVII. Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal shall have full power and authority to hear and determine, in such manner as is provided for that purpose in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the said City of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant.

37 GEO. III., c. 142, s. 13.

Courts may determine suits against the inhabitants according to the Charter, but their inheritance of lands, &c., to be determined as would have been done in a native Court; and where one party is a Mahomedan or Gentu, by the usages of the defendant, &c.

XIII. And be it further enacted, that the said Court, so to be erected as aforesaid, shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Madras and Bombay respectively, in the manner that shall be provided by the said Charter; yet, nevertheless, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentus, by the laws and usages of the Gentus or by such laws and usages as the same would have been determined by if the suit had been brought, and the action

commenced in a native Court: and where one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant; and in all suits so to be determined by the laws and usages of the natives, the said Court shall make such rules and orders for the conduct of the same, and frame such process for the execution of their judgments, sentences, or decrees, as shall be most consonant to the religions and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends of justice; and such means shall be adopted for compelling the appearance of witnesses, and taking their examination, as shall be consistent with the said laws and usages, so that the said suits shall be conducted with as much ease, and at as little expense, as is consistent with the attainment of substantial justice.

REGULATIONS RELATING TO MOHAMMADAN LAW.

REGULATION V. OF 1799.

PASSED ON THE 3RD OF MAY 1799.

A Regulation to limit the interference of the Zillah Courts of Diwání Adálat in the Execution of Wills, and administration to the Estates of persons dying Intestate.

Preamble.

I. Doubts having been entertained to what extent and in what manner the Judges of the Zillah Courts of Diwáni Adálat in the Provinces of Bengal, Bahár, Orissa, and Benares, are authorized to interfere in cases wherein the inhabitants of the above provinces may have left wills at their decease, and appointed executors to carry the same into effect, or may have died intestate, leaving an estate real or personal—with a view to remove all doubts on the authority of the Zillah Courts in such cases, and to apply thereto, as far as possible, the principle that in suits regarding succession and inheritance the Mahomadan laws with respect to Mahomadans and the Hindu laws with regard to Hindus be the general rules for the guidance of the Judges, the Vice-President in Council has passed the following Regulation, to be considered in force from the period of its promulgation in the above provinces respectively.

Executors to Hindus, Mahomadans, and others not being disqualified landholders, may take charge of the estate of the deceased, and proceed in execution of their trust, without any application to

II. In all cases of a Hindu, Mussalman, or other person subject to the jurisdiction of the Zillah Courts having at his death left a will and appointed an executor or executors to carry the same into effect, and in which the heir to the deceased may not be a disqualified landholder subject to the superintendence of the Court of Wards under any Regulation relative to the jurisdiction of the Court of Wards, the executors so appointed are to take charge of the estate of the deceased, and proceed in the execution of their trust according to the will of the deceased and the laws and usages of the

the Judge, or other officer of Government.

Courts of Justice prohibited to interfere in such cases except on a regular complaint.

country, without any application to the Judge of the Diwáni Adálat or any other officer of Government for his sanction; and the Courts of Justice are prohibited to interfere in such cases except on a regular complaint against the executors for a breach of trust or otherwise, when they are to take cognizance of such complaint in common with all others of a civil nature.

[This section, so far as it relates to the executors of persons, who are not Mahomadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal, was repealed by section 4, Act XXI. of 1870.]

Heirs of persons dying intestate, entitled to succeed to the whole estate and not subject to the Court of Wards, or their guardians not required to apply to Courts of Justice for permission to take possession of the estate, as far as can be done without violence.

And Courts of Justice restricted from interference without a regular complaint.

III. In case of a Hindu, Mussalman, or other person subject to the jurisdiction of the Zillah Courts dying intestate, but leaving a son or other heir who by the laws of the country may be entitled to succeed to the whole estate of the deceased, such heir, if of age and competent to take the possession and management of the estate, or, if under age or incompetent and not under the superintendence of the Court of Wards, his guardian or nearest of kin, who by special appointment or by the law and usage of the country may be authorized to act for him, is not required to apply to the Courts of Justice for permission to take possession of the estate of the deceased, as far as the same can be done without violence, and the Courts of Justice are restricted from interference in such cases except a regular complaint be preferred, when they are to proceed thereupon according to the general Regulations.

[So much of ss. 2 and 3 as restricts the interference of the Civil Courts in cases of inheritance by minors was repealed by s. 1, Act XL. of 1858. *Q. V.*]

More heirs than one to the estate of an intestate may appoint a common manager and take possession as in the

IV. If there be more heirs than one to the estate of a person dying intestate, and they can agree among themselves in the appointment of a common manager, they are at liberty to take possession, and the Courts of Justice are restricted from interference without a regular complaint, as in the case of a single heir; but, if the right of succession

to the estate be disputed between several claimants one or more of whom may have taken possession, the Judge, on a regular suit being preferred by the party out of possession, shall take good and sufficient security from the party or parties in possession for his or their compliance with the judgment that may be passed in the suit; or, in default of such security being given within a reasonable period, may give possession, until the suit may be determined, to the other claimant or claimants who may be able to give such security—declaring at the same time that such possession is not in any degree to affect the right of property at issue between the parties, but to be considered merely as an administration to the estate for the benefit of the heirs who may on investigation be found entitled to succeed thereto.

case of a single heir. But if the right of succession be disputed, the Judge on a regular suit to take security from the party in possession; or, in default of such security, may put the other claimants giving it in possession. Such possession not to affect the right of property.

V. In the event of none of the claimants to the estate of a person dying intestate being able to give the security required by the preceding section, and in all cases wherein there may be no person authorized and willing to take charge of the landed estate of a person deceased, the Judge within whose jurisdiction such estate may be situated (or in which the deceased may have resided, or the principal part of the estate may lie in the event of its being situated within two or more jurisdictions) is authorized to appoint an administrator for the due care and management of such estate, until, in the former case, the suit depending between the several claimants shall have been determined, or, in the latter case, until the legal heir to the estate or other person entitled to receive charge thereof as executor, administrator, or otherwise, shall attend and claim the same; when, if the Judge be satisfied that the claim is well-founded, or if the same be established after any enquiry that may appear necessary, the administrator appointed by the Court shall deliver over the estate to him with a full and just account of all receipts and disbursements during the period of his administration.

In what cases the Judge may appoint an administrator for the care and management of the estate of an intestate.

And when such administration is to cease.

Security to be taken from administrators appointed under this Regulation; and in what manner their allowance is to be fixed.

VI. In all instances of an administrator being appointed under this Regulation, he is, previous to entering upon the execution of his office, to give good security for the faithful discharge of his trust in a sum proportionate to the extent thereof; and the Judge appointing him is authorized to fix for him (subject to the approbation of the Court of Sádr Díwání Adálat to whom a report is to be made in such instances) an adequate personal allowance to be paid out of the proceeds of the estate, and to be a percentage thereupon after deducting the expenses of management.

[Ss. 5 and 6 have been amended by Reg. V. of 1827, which provides that the Civil Court shall issue a precept to the Collector, directing him to attach the estate and appoint a person for the proper care and management thereof, &c.]

Judges how to proceed in cases of persons dying intestate leaving personal property to which there may be no claimant.

VII. The Judges of the Zillah Courts, on receiving information that any person within their respective jurisdictions has died intestate leaving personal property, and that there is no claimant to such property, are to adopt such measures as may be necessary for the temporary care of the property, and to issue an advertisement in the current languages of the country, requiring the heir of the deceased or any person entitled to receive charge of his effects to attend for this purpose—such advertisement to be published on the spot where the property was found, at the Díwání Adálat kachahrí of the Zillah, and, if ascertainable, at the dwelling-place of the deceased, or, if the deceased were a European, in the *Calcutta Gazette*—after which, should any person attend and satisfy the Judge of his title to the property, or to receive charge thereof as executor, administrator, or otherwise, the same is to be delivered up to him on repayment of any necessary expense incurred in the care of it. Should no claim be preferred within the twelve months next ensuing, an inventory of the property and report of the circumstances of the case is to be transmitted to the Governor-General in Council for his orders.

[See Acts XIX. of 1841, XXVII. of 1860, X. of 1865, and XXI. of 1870.

This section was modified by s. 6, Reg. XV. of 1806, which, referring to the 39th and 40th Geo. III., cap. 79, s. 21 (which enacted that, when a *British subject* died intestate, and neither a creditor nor next of kin applied for letters of administration, the Register of the Supreme Court should administer to the estate of the deceased), directed Zillah Judges, whenever a *British European subject* died within the limits of their jurisdictions, and no will was to be found among the effects of the deceased, to report the circumstance without delay to the Register of the Supreme Court, retaining the property in their charge until letters of administration were obtained by the Register or some other person, when the property was to be delivered over to the person obtaining such letters, or, if a will were found subsequently, to the person obtaining probate of the will.

The law continued in this state up to 1855, when s. 6, Reg. XV. of 1806, was repealed by s. 53 of the Administrator-General's Act, VIII. of 1855. S. 54 of this Act, however, retained the modification of 1806, though making no specific mention of s. 7, Reg. V. of 1799. The very language of the old Regulation was used with one alteration merely, *viz.* that the Zillah Judge was now to report to the Administrator-General, instead of to the Register of the Supreme Court. In 1865 the Indian Succession Act was passed, applicable to all Europeans. Under this Act District Judges in the Mofussil were first vested with the power of granting probate and letters of administration. For this and other reasons it became necessary to amend the law relating to the office of the Administrator-General, and Act XXIV. of 1867 was passed for this purpose. S. 61 of this Act contained amended provisions corresponding to those of s. 54 of Act VIII. of 1855, which was repealed. These provisions were wider than those of the former Act and Regulation, for they related to all persons other than Hindus, Mahomadans, or Budhists, or persons exempted under s. 332 of the Indian Succession Act. Act XXIV. of 1867 was repealed by the Consolidating and Amending Act, II. of 1874, section 64 of which re-enacted the same provisions, which are as follows:—When any person other than a member of the above classes dies, leaving assets within the limits of the jurisdiction of a District Judge, it is the Judge's duty to report the circumstance without delay to the Administrator-General, retaining the property under his charge, or appointing an officer under the provisions of s. 239 of the Succession Act to take and keep possession of the same, until the Administrator-General shall have obtained letters of administration, or until some other person shall have obtained such letters or a certificate from the Administrator-General, when the Judge must deliver over the property to the person obtaining such letters of administration or certificate, or, in the event of a will being discovered, to the person who may obtain probate of the will.]

Nothing in this Regulation to limit, or alter, the jurisdiction of the Court of Wards.

VIII. Nothing in this Regulation is to be understood to limit or alter the jurisdiction of the Court of Wards in the appointment of managers or guardians for disqualified landholders, or in any case wherein a special power may be vested in the Court of Wards.

REGULATION XI. OF 1793.

PASSED ON THE 1ST OF MAY 1793.

A Regulation for removing certain restrictions to the operation of the Hindu and Mahomadan Laws with regard to the Inheritance of Landed Property subject to the Payment of Revenue to Government.

A custom, originating in considerations of financial convenience, was established in these Provinces under the native administrations, according to which some of the most extensive *zemindáris* are not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son or next heir of the deceased to the exclusion of all other sons or relations. This custom is repugnant both to the Hindu and Mahomadan laws, which annex to primogeniture no exclusive right of succession to landed property, and consequently subversive of the rights of those individuals, who would be entitled to a share of the estates in question, were the established laws of inheritance allowed to operate with regard to them as well as all other estates. It likewise tends to prevent the general improvement of the country, from the proprietors of these large estates not having the means, or being unable to bestow the attention requisite for bringing into cultivation the extensive tracts of waste land comprised in them. For the above reasons, and as the limitation of the public demand upon the estates of individuals as they now exist, and the rules prescribed for apportioning the amount of it on the several shares of any estates, which may be divided, obviate the objections and inconveniences that might have arisen from such divisions when the public demand was liable to annual or frequent variation, the Governor-General in Council has enacted the following rules.

[The custom here alluded to was concerned with extensive zemindaris or principalities, not with petty states.—*Kali Dass Mitter* v. *Harish Chandra Laik*, 2 Sev. 157.]

II. If any zemindár, independent talukdár, or other actual proprietor of land, shall die without a will, or without having declared by a writing, or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, who, by the Mahomadan or Hindu law (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled.

Landed property to descend according to the Mahomadan or Hindu law, unless the last proprietor shall have otherwise disposed of it in a manner sanctioned by those laws.

III. If any zemindár, independent talukdár, or other actual proprietor of land, shall die without a will, or without having declared by a writing, or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, who, by the Mahomadan or Hindu law (according as the parties may be of the former or latter persuasion), shall be respectively entitled to succeed to a portion of the landed property of the deceased under the rule contained in that section, such persons shall be at liberty, if they shall prefer so doing, to hold the property as a joint undivided estate. If one or more or all of the sharers shall be desirous of having separate possession of their respective shares, a division of the estate shall be made in the manner directed in Regulation XXV., 1793, and such sharer or sharers shall have the separate possession of such share or shares accordingly. If there shall be three or more sharers, and any two or more of them shall be desirous of holding their shares as a joint undivided estate, they shall be permitted to keep their shares united accordingly.

Two or more persons succeeding to an estate, to be at liberty to hold it as a joint undivided estate; or one or more or all of the sharers allowed to have separate possession of his or their shares; or two or more of the sharers permitted to hold their shares as a joint undivided estate.

IV. If any one or more of such sharers shall apply to have the separate possession of his or their share or shares, the proportion of the public jamá charged upon the whole estate,

Manager to be appointed to shares held in joint property.

Shares held separate how to be assessed.

which is to be assessed upon such share or shares, is to be adjusted according to the rules prescribed in section 10, Regulation I., 1793. If the estate is held khás or let in farm, the provisions contained in section 11, Regulation I., 1793, regarding estates so circumstanced, which may be divided, will be applicable to it.

This Regulation not to prevent persons transferring their property in the manner and to whom they may think proper, provided the transfer be not repugnant to the Hindu or Mahomadan law, or the Regulations of the Governor-General in Council.

V. Nothing contained in this Regulation is to be construed to . . . . .

VI. . . prohibit any actual proprietor of land bequeathing, or transferring by will, or by a declaration in writing, or verbally, either prior or subsequent to the 1st July 1794, his or her landed estate entire to his or her eldest son or next heir or other son or heir in exclusion of all other sons or heirs, or to any person or persons, or to two or more of his or her heirs in exclusion of all other persons or heirs, in the proportions and to be held in the manner which such proprietor may think proper, provided that the bequest or transfer be not repugnant to any Regulations that have been or may be passed by the Governor-General in Council, nor contrary to the Hindu or Mahomadan law; and that the bequest or transfer, whether made by a will or other writing or verbally, be authenticated by, or made before, such witnesses, and in such manner, as those laws and Regulations respectively do or may require.

[A was the owner of a large zemindári, which had been in his family many generations before the East India Company acquired the Diwáni, and was during that period an impartible Ráj descending on the death of each successive Rájáh to his eldest male heir according to the rule of primogeniture, such heir taking the whole, subject to the obligation of making allowances for maintenance to the junior members of the family. From 1767 A opposed the Company's authority. He was driven out by the Company's troops, and there was a virtual confiscation of his interest and that of his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. In 1790, when the Decennial Settlement was in contemplation or in course of being made, the Government of Lord Cornwallis granted the property to B, a minor and the grandson of A's cousin, whom A had murdered in one of his raids. In 1802, B attained his majority. He was not dis-

tinguished by any title from other zemindárs till 1837, when the title of mahárájáh was first conferred upon him. B had two sons, who predeceased him, each leaving two sons. B's elder son's elder son waived his rights in favor of his eldest son C, whom B desired to succeed him, as heir to an impartible ráj. B died in 1858, having executed a will in favor of C, and having made a consignment (taslim) of the ráj to him. On B's death, his other three grandsons claimed three-fourths of the property as descendible *ab intestato* in four equal shares to the four grandsons according to the ordinary course of Hindu law. The will was upheld both by the Calcutta High Court and before the Privy Council. It was, moreover, held by their Lordships of the Privy Council that, in the absence of all evidence to the contrary, the grant to B was a grant of the old zemindári with all its incidents; and that, as no intention was expressed of altering its descendible quality, this quality must be regarded as included in the grant; that the selection of a member of the old family, the next in succession to the excluded line, though it could not make ancestral what was self-acquired (and the property must be held self-acquired by B), was yet strong to show that the intention of Government was to restore the zemindári, as it had existed before the confiscation; and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major;* that Regulation XI. of 1793 could not alter the character of the grant made in 1790, nor could it be evidence of the intention of the Government in making a grant three years before the Regulation was passed.—Babu Birpertáb Sahi *v.* Mahárájáh Rajender Pertáb Sahi, 12 Moo. Id. Ap. 1; 9 W. R., Priv. Coun. Ap. 15.

See Reg. X. of 1800 *post*, and Notes thereto.]

REGULATION I. OF 1795.

PASSED ON THE 27TH OF MARCH 1795.

A Regulation for fixing in perpetuity the Revenue assessed on the Lands in the Province of Benares; for the more general Restoration of the ancient Zemindárs; and for extending to the Province of Benares the Rules prescribed in Regulation XLI., 1793.

Rule regarding succession to zemindari.

III. *Fourth.*—"The succession to zemindáris is to take place according to the established laws, rules, and customs of the country, as provided for in the Regulations passed, or which may be enacted, for the Province of Benares.

REGULATION XLIV. OF 1795.

PASSED ON THE 28TH OF AUGUST 1795.

A Regulation for removing certain restrictions to the operation of the Hindu and Mahomadan Laws with regard to the Inheritance of Landed Property subject to the Payment of Revenue to Government in the Province of Benares.

Preamble.

ON grounds similar to those stated in the Preamble to Regulation XI., 1793, for removing certain restrictions to the operation of the Hindu and Mahomadan laws with regard to the inheritance of landed property subject to the payment of revenue to Government in the Provinces of Bengal, Bahár and Orissa, the following rules have been enacted for the Province of Benares.

After the beginning of the Fussily year 1204, landed property to descend according to the Mahomadan or Hindu law, unless the last proprietor shall have otherwise disposed of it in a manner sanctioned by those laws.

II. After the first day of the Fussily year 1204, if any talukdár, zemindár, or other actual proprietor of land, shall die without a will, or without having declared by a writing or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, who by the Mahomadan or Hindu law (according as the parties may be of the former or latter persuasion) may be respectively entitled to succeed to a portion of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled.

Two or more persons succeeding to an estate to be at liberty to hold it as a joint undivided estate;

III. If any talukdár, zemindár, or other actual proprietor of land, shall die subsequent to the period specified in section 2 without a will, or without having declared by a writing or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, who by the Mahomadan or Hindu law (according as the parties may be of the former or the latter persuasion) shall be respectively entitled to succeed to

a portion of the landed property of the deceased under the rule contained in that section, such persons shall be at liberty, if they shall prefer so doing, to hold the property as a joint undivided estate. If one, or more, or all of the sharers shall be desirous of having separate possession of their respective shares, a division of the estate shall be made in the manner directed in Regulations XXV., 1793, and XXVI., 1795, and such sharer or sharers shall have the separate possession of such share or shares accordingly. If there shall be three or more sharers, and any two or more of them shall be desirous of holding their shares as a joint undivided estate, they shall be permitted to keep their shares united accordingly.

or one, or more, or all of the sharers allowed to have separate possession of their shares;

or two or more of the shares permitted to hold their shares as a joint undivided estate.

IV. It is to be understood that, if any one or more of such sharers shall apply to have the separate possession of his or their share or shares, the proportion of the public jamá charged upon the whole estate, which is to be assessed upon such share or shares, is to be adjusted according to the rules prescribed in section 7, Regulation XXVII., 1795.

Shares held separate, how to be assessed.

V. Nothing contained in this Regulation is to be construed to entitle any person to a share of an estate which may be now held entire by any individual, or that may devolve entire to any individual prior to the beginning of the Fussily year 1204 in exclusion of the other heirs of the last proprietor under the custom in virtue of which such individual may so hold or succeed to the whole of such estate, and for the future abolition of which this Regulation is enacted; but such person or persons are to be considered bound in the cases specified in clause tenth, section 35, Regulation XXII., 1795, by what they had acquiesced in.

This Regulation not to be in force until the beginning of the Fussily year 1204, and then not to operate retrospectively.

VI. Nor to prohibit any actual proprietor of land bequeathing or transferring by will, or by a declaration in writing, or verbally, either prior or subsequent to the Fussily

Nor to prevent persons transferring their property

in the manner and to whom they may think proper, provided the transfer be not repugnant to the Hindu or Mahomadan law, or the Regulations of the Governor-General in Council.

year 1204, his or her landed estate entire, to his or her eldest son or next heir or other son or heir in exclusion of all other sons or heirs, or to any person or persons or to two or more of his or her heirs in exclusion of all other persons or heirs in the proportions and to be held in the manner which such proprietor may think proper, provided that the bequest or transfer be not repugnant to any Regulations that have been or may be passed by the Governor-General in Council, nor contrary to the Hindu or Mahomadan law, and that the bequest or transfer, whether made by a will or other writing or verbally, be authenticated by, or made before, such witnesses and in such manner as those laws and Regulation respectively do or may require.

REGULATION X. OF 1800.

PASSED ON THE 11TH OF DECEMBER 1800.

A Regulation for preventing the Division of landed Estates in the Jangal Maháls of the Zillah of Midnapur and other Districts.

Preamble.

By Regulation XI., 1793, the estates of proprietors of land dying intestate are declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Mahomadan laws. A custom, however, having been found to prevail in the Jangal Maháls of Midnapúr and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established and being founded in certain circumstances of local convenience which still exist —the Governor-General in Council has enacted the following rule to be in force in the Provinces of Bengal, Bahár, and Orissa from the date of its promulgation.

II. Regulation XI., 1793, shall not be considered to supersede or affect any established usage which may have obtained in the Jangal Mahâls of Midnapur and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir to the exclusion of the other heirs of the deceased. In the *mahâls* in question the local custom of the country shall be continued in full force as heretofore, and the Courts of Justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those *mahâls.*

Regulation XI, 1793, not to operate in the Jangal Mahâls of Midnapur and other districts.

[See ss. 36 and 37 of Reg. XII. of 1805.

The construction to be put upon this Regulation and Reg. XI of 1793 read together was discussed in *Raja Didar Hosein* v. *Rani Zahuranissa*, II. Moo. Ind. Ap. 476. Their Lordships of the Privy Council said :— "It was, however, contended on the part of the appellant, that the Reg. of 1793 was repealed with respect to this zemindâri by another Regulation (X of 1800). . . . . But it is clear to their Lordships that this latter Regulation did not apply to undivided zemindâris in which a custom might prevail that the inheritance should be indivisible, but only to the jangal mahâls and other entire districts, where local custom prevails. The construction contended for, *viz.* that every individual zemindâri, in which the custom had been that it should descend entire, was exempted, would repeal the Regulation of 1793 altogether; whereas it is clear that it was intended to be partially repealed only." In an earlier portion of the same judgment, their Lordships said :— "Two grounds, therefore, on which the appellant has rested his claim having failed, it now becomes necessary to dispose of the third, that principally insisted upon in the argument before us, *viz.* the supposed family custom that the zemindâri had never been separated, but devolved entire on every succession, and that such custom was still in force. If the existence of the custom in point of fact was the question to be determined by their Lordships, they would have entertained some doubt upon it; for the circumstance that the zemindâri had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it, and gives great countenance to the supposition that such a custom existed. But, supposing that were so, their Lordships are clearly of opinion that the family usage cannot exempt this zemindâri from the operation of the Reg. XI. of 1793." This case seems to decide that in the provinces of Bengal, Bahâr, and Orissa, local custom prevailing in an entire district may, though family usage cannot, make a zemindâri impartible and descendible to a single heir in cases to which Bengal Reg. XI. of 1793 is applicable. In the case of the Tirhut Râj* their Lordships said :—" We apprehend that the prin-

Construction of Regs. XI. of 1793 and X. of 1800.

* *Ganesh Dutt Sing* v. *Maharaja Moheshur Sing and others*, VI. Moo. Ind. Ap. 187.

ciple upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this district (Tirhut), and indeed generally under the Hindu law, estates are divisible amongst the sons when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a raj, as a principality, the general rule is otherwise, and must be so. It is a sovereignty, a principality—a subordinate sovereignty and principality, no doubt, but still a limited sovereignty and principality—which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families, where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary. Now, it is said in this case that there is no positive law which excludes the divisibility, unless it be clearly proved to be an ancient ráj, which it is denied that it is. But Reg. XI. of 1793 really has no bearing upon the case, for the Regulation of 1793 is confined to cases in which there is no deed and no will executed. While there is a deed, or where there is a will, it does not give a validity to that deed or that will which the deed or will would not otherwise possess, but leaves it precisely where it stood before; therefore the Regulation of 1793 and Reg. X. of 1800 and the authorities upon this point, which have been referred to, do not appear to their Lordships to be at all involved in the consideration of the present case." In this case there was a deed of gift by the late Rájá to his eldest son. The decision did not turn on the point whether family usage can render a zemindári impartible in cases to which the Regulation applies. It was decided merely that a ráj, in respect of which there is evidence of family usage of impartibility, is an exception to the general rule of Hindu law as to partibility. Whether this general proposition would be affected by Reg. XI. of 1793 was not a question which arose, there being a deed of gift, and the Regulation being therefore inapplicable. Family usage through fourteen generations was proved, and the custom founded thereon was held to be a good custom in respect of a ráj. In the Hunsapur case* (*Babu Birpertab Sahi* v. *Maharajah Rajendra Pertab Sahi*, XII. Moo. Ind. Ap. 1, and IX W. R. P. C. 15), their Lordships spoke of Reg. XI. of 1793 as "a general law, which confessedly does not affect the descent of large zemindáris held as ráj, or subject to kulachar or family custom." It may be observed, however, that in this case also there was a deed or will, the validity of which was held to have been proved. In the Shoosung case the High Court held (II. W. R. Civ. Rul. 80) that the estate in question was not an indivisible ráj, and that an alleged family custom of descent to the eldest son to the exclusion of the other sons had not been proved. In appeal to the Privy Council, the decision on the first point was not seriously contested, and remained undisturbed. Their Lordships, having expressed their opinion that the estate after settlement with Government was held as an ordinary zemindári, observed that such settlement would not of itself have operated to destroy a family usage regulating the manner of descent. "It would not have had this effect," they proceeded, "in the case of a well-established ráj (see *Babu Birpertab Sahi* v. *Maharajah Rajendra*

Reg. XI. of 1793 has no application where there is a deed or will.

* For this case before the Calcutta High Court, see W R. Special No. 97.

Pertab Sahi, XII Moo. Ind. Ap. 1), and even in the case where the origin could not be shown, it may be assumed that it would not of itself affect an existing family custom. Reg. XI. 1793 was passed soon after this settlement. That Regulation has been held not to be applicable to the succession of a well-established ráj (see XII. Moore 1; and VI. Moore 161—7). But the respondents contend that, notwithstanding the qualification placed upon it by Reg. X. 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the zemindári itself or on a local or district custom (see *Raja Didar Hosein* v. *Rani Zahuranissa*, II. Moo. Ind. Ap. 111). Their Lordships do not think it necessary to give any opinion on the positive effect of Reg. XI. 1793, for they think that in the present case there is sufficient ground for the presumption that, after the settlement and this Regulation, the family were induced to regard the former state of things and the ancient tenures, whatever they were, at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that they did so consider and treat it."—XIX W. R. Civ. Rul. 10. As the family custom set up was found to be no longer in existence, it thus became unnecessary to decide the question of the effect of the Regulation upon a zemindári. Should this exact point ever arise, it may perhaps be held that Reg. XI. of 1793 was merely intended to do away with the custom referred to in the preamble, *viz.* a custom originating under the native administrations in considerations of financial convenience, and repugnant both to Hindu and Mahomadan laws; and that it was not intended to interfere with any custom consonant with those laws, and having an origin wholly distinct from that here indicated. The case of the Nadia ráj, which is another example of an impartible principality, was decided in 1792 before Reg. XI. of 1793 was passed (Strange's Hindu Law, Vol. II., p. 447). It was said in the judgment in this case, that by the 137th Article of the (old) Regulations it is directed that in cases of succession to zemindáris the Judge do ascertain whether they have been regulated by any general usage of the parganá where the disputed land is situated, or by any particular usage of the family suing; and do consider in his decision the weight due to the evidence on this head. The following cases may well be referred to in connection with what has just been said:—*Anand Lal Singh Deo* v. *Maharaja Dheraj Garud Narain Deo Bahadur*, V. Moo. Ind. Ap. 82:* *Rawat Arjun Singh and Rawat Darjan Singh* v. *Rawat Ghansiam Singh*, V. Moo. Ind. Ap. 169: *Kattama Nauchiar* v. *The Raja of Shivagangah*, IX. Moo. Ind. Ap. 539 ("The zemindári is admitted to be in the nature of a principality, impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of India (district of Madura, Madras Presidency), with such qualifications only as flow from the impartible character of the subject"): the cases connected with the Tipperah Ráj, *viz.* *Ram Ganga Deo* v. *Durga Mani Juba-Raj*, Ben. S. D. A. Rep. Vol. I. p. 270: *Bir Chandra Juba-Raj* v. *Nilkrishna Takur and others*,

* See also for this case, Ben. S. D. A. Rep. Vol. VI. p. 282.

I. W. R. Civ. Rul. 177, and *Nilkrishto Deb Barmano* v. *Bir Chandra Takur* (in appeal before the Privy Council), III. B. L. R. P. C. 19 ("Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom"):—*Rani Bistoprea Patmahadea* v. *Basudeb Dul Beworti Patnaick*, II. W. R. Civ. Rul. 232 (Keonghur Raj in Cuttack—Sons by wife of a lower caste rank after sons of same caste with Raja):—*Nityanand Mardiraj* v. *Srikaran Juggernath Bewartah Patnaick*, III. W. R. Civ. Rul. 116 (Attgurh Raj in Cuttack—Brother to be preferred to son by a slave-girl):—*Raja Nagendra Narain* v. *Raghunath Narain Deo*, Suth. Rep. Jan.—July, 1864, 20 (Pulkusunah, Manbhoom):—*Login and another* v. *Princess Victoria Gauramma of Coorg*, I. Jur. O. S. 109:—*Lalla Indernath Sahi Deyu* v. *Takur Kasinath Sahi and others*, Ben. S. D. A. Rep. for 1845, p. 17:—*Maharaj Kowar Basdeo Singh* v. *Maharaja Rudar Singh Bahadur*, Ben. S. D. A. Rep. for 1846, p. 22:—*Rani Haro Sundari Debya* v. *Raja Bisonath Singh*, Ben. S. D. A. Rep. for 1847, p. 339:—*Mutuvengada Chellasamy Manigar* v. *Tumbayasamy Manigar and others*, Mad. S. D. A. Rep. for 1849, p. 27:—and *Jagannadharow* v. *Kandarow*, Mad. S. D. A. Rep. for 1849, p. 112.

As to *family usage* unconnected with a *raj* or principality, the following cases may be consulted:—*Sarendra Nath Rai* v. *Hiramani Barmani*, XII. Moo. Ind. Ap. 91, and I. B. L. R. P. C. 32. ("The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of *usage or custom of the family*. It must have had a legal origin and have continuance (see *Abraham* v. *Abraham*),* and, whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both):—*Doe d. Jagomohan Rai* v. *Srimati Nimu Dasi*, Morton's Cases in Hindu Law by Montriou, p. 595. ("I have no hesitation in saying that we are bound to take notice of any special customs which may exist among the Hindus, or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindus. Mr. Ellis of the Madras Civil Service has shown that many customs and usages have been adopted from a former people by their Brahminical conquerors, and have become a part of the Hindu Code, although not in any degree founded on the Shastras. It may be said that, from the year 1756 to the year 1765, there was a double Government in this country, and during this period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident that many usages were then introduced that are now recognized as Hindu customs; and, if any of the usages which were introduced at that period are relied upon as law, we are bound to take notice of them, should it be shown to us that they have become the written law of the land. But even if they have not become written law, and they are specially pleaded, we must still recognize them as a valid subsisting custom, on the presumption that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this than there is in recognizing the local customs of

Family usage not connected with a Raj.

* IX. Moo. Ind. Ap. 224.

England"*:—*Gopal Sindh Mán Data Mahapater* v. *Narattan Sindh and others*, Ben. S. D. A. Rep. for 1845, p. 195 :—*Rasick Lal Bhanj and others* v. *Purush Mani*, Ben. S. D. A. Rep. for 1847, p. 205 :—and *Samran Singh and others* v. *Khedan Singh and another*, Ben. S. D. A. Rep. for 1814, p. 116. As to the destruction of such a custom by non-user or discontinuance, the following observations were made in *Raja Raj Kissen Singh* v. *Ramjai Surma Mazumdar and others* (XIX. W. R. Civ. Rul. 12) :—"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are, in their nature, different from a territorial custom which is the *lex loci* binding all persons within the local limits within which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous; and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been long acted upon.]

* Per Grey, C.J.

MADRAS REG. III. OF 1802.

Executors to Mahomadans and others whose heirs are not disqualified landholders, to take charge of assets and execute trust. Courts not to interfere, except on regular complaint. Procedure in such complaint

XVI. (cl. 2).—In all cases of a Mussulman, or other person subject to the jurisdiction of the Zila Courts, having at his death left a will and appointed an executor or executors to carry the same into effect, and in which the heir to the deceased may not be a disqualified landholder subject to the superintendence of the Court of Wards, the executors so appointed are to take to charge of the estate of the deceased, and proceed in the execution of their trust according to the will of the deceased and the laws and usages of the country, without any application to any Officer of Government for his sanction; and the Courts of justice are prohibited to interfere in such cases, except in a regular complaint against the executors for a breach of trust, or otherwise, when they are to take cognizance of such complaint, in common with all

others of a civil nature, *taking the opinion of their law officers upon any legal exception to the executors, as well as upon the provision to be made for the administration of the estate, in the event of the appointed executor being set aside, and generally upon all points of law that may occur;* with respect to which the Judge is to be guided by the law of the parties, *as expounded by his law officers,* subject to any modifications enacted by the Governor in Council in the form prescribed by Regulation I., 1802.*

* This clause, so far as it applies to Hindus, was repealed by Mad. Reg. V. of 1829, s. 2 So much of this clause as applies to law officers is repealed by Madras Act No. V. of 1867.

BENGAL REG. XI. OF 1816.

PASSED ON THE 10TH OF MAY 1816.

A Regulation for receiving, trying, and deciding claims to the right of inheritance or succession in certain tributary estates in Zila Katak.

Laws and usages to guide decision of such claims.

III. The Superintendent, in deciding cases of the above nature, shall be generally guided by the established laws and usages of the respective tributary estates.

BOMBAY REG. IV. OF 1827.

PASSED ON THE 1ST JANUARY 1827.

Law to be observed by Courts.

XXVI. The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity, and good conscience alone.*

* Declared to apply to the whole of the Bombay Presidency except the Scheduled Districts, Act No. XV. of 1874.

BENGAL SECRETARIAT LIBRARY

AJMERE REG. III. OF 1877.

A Regulation to declare and amend the law in force in Ajmer and Merwára.

Claims under contracts of dower.

IV. In questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mohammadan law in cases where the parties are Mohammadans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Regulation :

Provided that, when among any class or body of persons, or among the members of any family, any custom prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.

Rules of decision in cases of certain classes.

XXXII. When any claim is made under a contract of dower entered into by a Mohammadan husband, whether such claim is made during his life-time or after his death, and whether it is a claim made by a plaintiff, or a claim by way of set-off or lien made by a defendant, the Court shall allow such amount only as appears to be reasonable with reference to the means of such husband, anything to the contrary in such contract notwithstanding.

ACTS RELATING TO MOHAMMADAN LAW.

ACT V. OF 1843.

PASSED ON THE 7TH OF APRIL 1843.

An Act for declaring and amending the law regarding the condition of Slavery within the Territories of the East India Company.

Prohibition of sale of person or right to his labor on ground of slavery.

1. No public officer shall, in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell or cause to be sold any person, or the right to the compulsory labor or services of any person on the ground that such person is in a state of slavery.

Bar to enforcement of rights arising out of alleged property in person as a slave.

2. No rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company.

Bar to dispossession of property on ground of owner's slavery.

3. No person who may have acquired property by his own industry, or by the exercise of any art, calling, or profession, or by inheritance, assignment, gift, or bequest, shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave.

Penal offence against alleged slave.

4. Any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

ACT XXI. OF 1850.

PASSED ON THE 11TH OF APRIL 1850.

*An Act for extending the principle of section 9, Regulation VII., 1832, of the Bengal Code, throughout the Territories subject to the Government of the East India Company.**

Preamble.

WHEREAS it is enacted by section 9, Regulation VII., 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mohammadan persuasion, or where one or more of the parties to the suit shall not be either of the Mohammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company, it is enacted as follows:—

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

1. So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste,† shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories. ‡

* Declared to apply to the whole of British India, except the Scheduled Districts, Act No. XV. of 1874.

† 13 Beng 25, 75—76.

‡ 9 Moo. I A. 239.

ACT I. OF 1869.

ADOPTION BY MOHAMMADAN TALUKDARS OF OUDH.

29. Every Mohammadan talukdár, grantee, heir, or legatee, and every widow of a Mohammadan talukdár or grantee, heir or legatee, with the consent in writing of her deceased husband, shall, for the purposes of this Act, have power to adopt a son whenever, if he or she were a Hindu, he or she might adopt a son.

Such power shall be exerciseable only by writing executed and attested in manner required by section 19 in case of a will and registered.

ACT NO. XXI. OF 1870.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 19TH JULY 1870.

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay.

Partial repeal of Bengal Regulation V. of 1799, section 2.

4. On and from that day, section 2 of Bengal Regulation V. of 1799 shall be repealed so far as relates to the executors of persons who are not Mohammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

ACT VI. OF 1871.

THE BENGAL CIVIL COURTS ACT.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 10TH FEBRUARY, 1871.

An Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal.

Certain decisions to be according to native law.

24. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Mohammadan law in cases where the parties are Mohammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

ACT IV. OF 1872.

THE PUNJAB LAWS ACT.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 28TH OF MARCH 1872.

An Act for declaring which of certain rules, laws, and regulations have the force of law in the Panjáb, and for other purposes.

CIVIL JUDICATURE.

Decisions in certain cases to be according to native law.

5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

(*a*) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;

(*b*) the Mohammadan law, in cases where the parties are Mohammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

ACT III. OF 1873.

THE MADRAS CIVIL COURTS ACT.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 21ST OF JANUARY 1873.

An Act to consolidate and amend the law relating to the Civil Courts of the Madras Presidency subordinate to the High Court.

Law administered by Courts to natives.

16. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

(*a*) the Mohammadan law in cases where the parties are Mohammadans, and the Hindu law in cases where the parties are Hindus, or,

(*b*) any custom (if such there be) having the force of law, and governing the parties or property concerned,

shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished.

(*c*) In cases where no specific rule exists, the Court shall act according to justice, equity, and good conscience.*

* This is equivalent to s. 17 of Mad. Reg. II. of 1802, as to which see 9 Moo. I. A. Cases, 195 and 303.

ACT IX. OF 1875.

THE INDIAN MAJORITY ACT.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 2ND MARCH 1875.

An Act to amend the Law respecting the age of Majority.

WHEREAS, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority than now exists; It is hereby enacted as follows:— **Preamble.**

1. This Act may be called "The Indian Majority Act, 1875:" **Short title.**

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty; **Local extent.**

and it shall come into force and have effect only on the expiration of three months from the passing thereof. **Commencement and operations.**

2. Nothing herein contained shall affect— **Savings.**

(a) the capacity of any person to act in the following matters (namely),—Marriage, Dower, Divorce, and Adoption;

(b) the religion or religious rites and usages of any class of Her Majesty's subjects in India, or

(c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

3. Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X. of 1865) or in **Age of majority of persons domiciled in British India.**

any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before:

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

Age of majority how computed.

4. In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day.

Illustrations.

(*a.*) Z is born in British India on the first day of January, 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January, 1871.

(*b.*) Z is born in British India on the twenty-ninth day of February, 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(*c.*) Z is born on the first day of January 1850. He acquires a domicile in British India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868.

ACT XVII. OF 1875.

THE BURMA COURTS ACT.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 16TH OF SEPTEMBER 1875.

An Act to consolidate and amend the law relating to the Courts in British Burma, and for other purposes.

CHAPTER II.—LAW TO BE ADMINISTERED.

Certain decisions to be according to native law.

4. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution,

the Buddhist law in cases where the parties are Buddhists,

the Mohammadan law in cases where the parties are Mohammadans, and

the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burma.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

Law to be administered in Court of Recorder of Rangoon.

5. Except as provided in section 4, all questions arising in suits before the Recorder of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court in the exercise of its ordinary original civil jurisdiction.

ACT XX. OF 1875.

PASSED BY THE PRESIDENT IN COUNCIL ON THE 23RD NOVEMBER 1875.

Received the assent of the Governor-General on the 9th December 1875.

An Act to declare and amend the Law in force in the Central Provinces.

Rules of decision in cases of certain classes.

5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mohammadan law in cases where the parties are Mohammadans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been, by legislative enactment, altered or abolished, or is opposed to the provisions of this Act:

Provided that when, among any class or body of persons, or among the members of any family, any custom prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.

ACT I. OF 1876.

RECEIVED THE ASSENT OF THE LIEUTENANT-GOVERNOR ON THE 23RD NOVEMBER 1875, AND OF THE GOVERNOR-GENERAL ON THE 11TH JANUARY 1876.

An Act to provide for the voluntary registration of Mohammadan marriages and divorces.

WHEREAS it is expedient to provide for the voluntary registration of marriages and divorces among Mohammadans; It is enacted as follows:— Preamble.

1. This Act shall commence and take effect in those districts in the provinces subject to the Lieutenant-Governor of Bengal to which the said Lieutenant-Governor shall extend it by an order published in the *Calcutta Gazette*;* and thereupon this Act shall commence and take effect in the districts named in such order, on the day which shall be in such order provided for the commencement thereof. Local extent.

2. In this Act—unless there be something repugnant in the subject or context— Interpretation.

"Mohammadan registrar" means any person who is duly authorized under this Act to register marriages and divorces:

"Inspector-General of Registration" and "registrar" respectively mean the officers so designated and appointed under the Indian Registration Act, 1871, or other law for the time being in force for the registration of documents:

"district" means a district formed under the provisions of the Indian Registration Act, 1877.†

"parda-nishín" means a woman who, according to the custom of the country, might reasonably object to appear in a public office.

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* This Act has been extended to the districts of Dacca, Mymensingh, Backergunge, Rungpore, Bogra, and Chittagong.—*Calcutta Gazette*, 1876, p. 89; to Noakholly, *ibid.*, p. 650; to Tipperah, *ibid.*, p. 1311; to Jessore, *ibid.*, p. 1398; to Furreedpore, Pubna, Kooshtea, Dinagepore, Nattore, *ibid.*, p. 1492.

† Act No. III. of 1877, s. 2, para. 3.

Lieutenant-Governor may grant licenses to register.

3. It shall be lawful for the Lieutenant-Governor to grant a license to any person, being a Mohammadan, authorizing him to register Mohammadan marriages and divorces which have been effected within certain specified limits, on application being made to him for such registration; and in like manner it shall be lawful for the said Lieutenant-Governor to revoke or suspend such license:

Provided that no more than two persons shall be licensed to exercise the said functions within the same limits: and provided further that when two persons are so licensed to act within the same limits, the one shall be a member of the Sunni, and the other of the Shiá sect.

Mohammadan registrars to use seals.

4. Every Mohammadan registrar shall use a seal bearing the following inscription in the Persian character and language: "The seal of the Mohammadan registrar of

Government to provide seal and books.

5. The Lieutenant-Governor shall supply for the office of every Mohammadan registrar the seal and the books necessary for the purposes of this Act.

The pages of such books shall be consecutively numbered in print, and the number of pages in each book shall be certified on the title-page by the officer by whom such books are issued.

Mohammadan registrar to keep registers.

6. Every Mohammadan registrar shall keep the following register-books:

Book I.—Register of marriages, in the Form A contained in the schedule to this Act;

Book II.—Register of divorces other than those of the kind known as *Khula*, in the Form B contained in the schedule to this Act;

Book III.—Register of divorces of the kind known as *Khula*, in the Form C contained in the schedule to this Act.

7. All entries in each register prescribed by the last preceding section shall be numbered in a consecutive series, which shall commence and terminate with the year, a fresh series being commenced at the beginning of each year. **Entries to be numbered.**

8. Every application for registration under this Act shall be made to the Mohammadan registrar orally as follows:— **Applications by whom to be made.**

If the application be for the registration of a marriage—

by the parties to the marriage jointly: provided that, if the man, or the woman, or both, be minors, application shall be made on their behalf by their respective lawful guardians: and provided further that, if the woman be a parda-nishín, such application may be made on her behalf by her duly authorized vakíl.

If the application be for registration of a divorce other than of the kind known as Khula—

by the man who has effected the divorce.

If the application be for the registration of a divorce of the kind known as Khula—

by the parties to the divorce jointly: provided that, if the woman be a parda-nishín, such application may be made on her behalf by her duly authorized vakíl.

9. On application being made to a Mohammadan registrar for registration under this Act of a marriage or divorce within one month of the marriage or divorce being effected, and not otherwise, and on payment to him of a fee of one rupee, the Mohammadan registrar shall— **Duties of Mohammadan registrar on application.**

(*a*) satisfy himself whether or not such marriage or divorce was effected by the person or persons by whom it is represented to have been effected:

(*b*) satisfy himself as to the identity of the person appearing before him and alleging that the marriage or divorce has been effected;

(c) in the case of any person appearing as representative of the man or woman (whether he appear as guardian or vakíl), satisfy himself of the right of such person to appear.

If the Mohammadan registrar be satisfied on the above points, and not otherwise, he shall make an entry of the marriage or divorce in the proper register:

Provided that no such entry shall be made otherwise than in the presence of every person who, by section 11 of this Act, is required to sign such entry.

Mohammadan registrar may receive gratuity.

10. Nothing in the preceding section shall be held to prohibit a Mohammadan registrar from receiving a gratuity in excess of the prescribed fee of one rupee, when such gratuity is voluntarily tendered.

Entries by whom to be signed.

11. Every entry in a register kept under this Act shall be signed as follows:—

If the entry be of a marriage in a register in the Form A contained in the schedule to this Act—

(1) by the parties to the marriage, or, if either or both of them be minors, by their lawful guardians respectively: provided that, if the woman be a pardanishín, the entry may be signed on her behalf by her duly authorized vakíl;

(2) by two witnesses who were present at the marriage-ceremony;

(3) in cases in which the woman is represented by a vakíl—by two witnesses to the fact of the vakíl having been duly authorized to represent her;

(4) by the Mohammadan registrar.

If the entry be of a divorce other than the kind known as Khula in a register in the Form B contained in the schedule to this Act—

(1) by the man who has effected the divorce;

(2) by the witness who identifies the man who has effected the divorce;

(3) if the man be of the Shiá sect—by two witnesses to the divorce being effected;

(4) by the Mohammadan registrar.

If the entry be of a divorce of the kind known as Khula in a register in the Form C contained in the schedule to this Act—

(1) by the parties to the *Khula:* provided that, if the woman be a parda-nishín, the entry may be signed on her behalf by her duly authorized vakíl;

(2) by the person who identifies the man;

(3) by the person who identifies the woman;

(4) if the application for registration has been made by a vakíl on behalf of the woman—by two witnesses to the fact of the vakíl having been duly authorized to represent her;

(5) if the man be of the Shiá sect—by two witnesses to the divorce being effected;

(6) by the Mohammadan registrar.

Copies of entry to be given to parties.

12. On completion of the registration of any marriage or divorce, the Mohammadan registrar shall deliver to each of the applicants for registration an attested copy of the entry; and for such copy no charge shall be made.

Index to be kept.

13. In every office in which any register hereinbefore mentioned is kept, there shall be prepared a current index of the contents of such register; and every entry in such index shall be made, so far as practicable, immediately after the Mohammadan registrar has made an entry in any such register.

Particulars to be shewn in index.

14. The index mentioned in the last preceding section shall contain the name, place of residence, and father's name, of each party to every marriage or divorce, and the date of registration.

It shall also contain such other particulars, and shall be prepared in such form, as the Lieutenant-Governor may direct.

Index may be inspected and copies of entries in registers taken.

15. Subject to the previous payment of the fees prescribed, the index, whether it be in the office of the Mohammadan registrar or of the registrar of the district, and the copies of entries in such index, which are filed in the office of the registrar of the district under the provisions of section 22 of this Act, shall be at all times open to inspection by any person applying to inspect the same; and copies of entries in any of the registers, and of the certified copies of such entries, which are filed in the office of the registrar of the district under section 22 of this Act, shall be given to all persons applying for such copies.

Such copies shall be signed and sealed by the registrar of the district or by the Mohammadan registrar, as the case may be.

Fees for searches and copies.

16. Every registrar of a district and every Mohammadan registrar shall, for the purposes of this Act, be entitled to levy the following fees:—

for every search or permission to search in any index or register under his charge—four annas:

for every certified copy of any entry in a register other than the first referred to in section 12 of this Act—one rupee.

Mohammadan registrars to be subject to control of district registrar.

17. Every Mohammadan registrar shall perform the duties of his office under the superintendence and control of the registrar in whose district the office of such Mohammadan registrar is situate.

In the town of Calcutta every Mohammadan registrar shall perform the duties of his office under the superintendence and control of the Inspector-General of Registration.

Every registrar, and in the town of Calcutta the Inspector-General of Registration, shall have authority to issue (whether on complaint or otherwise) any order consistent with this Act, which he considers necessary in respect of any act or omission of any Mohammadan registrar subordinate to him.

Inspector-General of Registration to exercise general superintendence.

18. The Inspector-General of Registration shall exercise a general superintendence over offices of all Mohammadan registrars, and shall have power from time to time to frame rules consistent with this Act for the guidance of the said Mohammadan registrars, and the regulation of their offices generally.

Rules to be approved by Lieutenant-Governor and published in Gazette.

19. All rules framed in accordance with the last preceding section shall be submitted to the Lieutenant-Governor for approval, and after they have been approved, they shall be published in the official Gazette, and shall then have the same force as if they were inserted in this Act.

Refusal to register to be recorded.

20. Every Mohammadan registrar refusing to register a marriage or divorce shall make an order of refusal, and record his reasons for such order in a book to be kept for that purpose.

Appeal against refusal to register.

21. An appeal shall lie against an order of a Mohammadan registrar refusing to register a marriage or divorce, to the registrar to whom such Mohammadan registrar is subordinate, if presented to such registrar within twenty days from the date of the order, and the registrar may reverse or alter such order; and the order passed by the registrar on appeal shall be final.

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* See *Calcutta Gazette*, March 29, 1876, part i., p. 295; *ibid.*, April 5, 1876, part i., pp. 316—320; *ibid.*, Aug. 23, 1876, part i., p. 1053.

Copies of entries to be sent monthly to registrar of district.

22. Every Mohammadan registrar shall, at the expiration of every month, send certified copies of all entries made by him during the month in the registers mentioned in section 6 of this Act, and also of the entries which have been made in the index referred to in sections 13 and 14 of this Act, to the registrar of the district within which such Mohammadan registrar has been authorized to act, and the registrar, on receiving such copies, shall file them in his office.

Registers to be given up.

23. Every Mohammadan registrar shall keep safely each register until the same shall be filled, and shall then, or earlier if he shall leave the district or cease to hold a license, make over the same to the registrar of the district for safe custody, or to such other person as the registrar may direct.

Lieutenant-Governor may prescribe rules.

24. The Lieutenant-Governor may from time to time prescribe such rules as he thinks fit, provided that such rules be not inconsistent with any provision of this Act,

(*a*) for determining the qualifications to be required from persons to whom licenses under section 3 of this Act may be granted;

(*b*) for regulating the attendance of Mohammadan registrars at the celebration of marriages, and their remuneration for such attendance;

(*c*) for regulating the grant of copies by registrars and Mohammadan registrars;

(*d*) for regulating the payment by the Mohammadan registrars of the cost of the seals, forms of registers, stationery, and any other articles which may be supplied to them by the Government;

(*e*) for regulating the application of the fees levied by registrars of districts and Mohammadan registrars under this Act; and

(*f*) for regulating such other matters as appear to the Lieutenant-Governor necessary to effect the purposes of this Act.

The Lieutenant-Governor may, from time to time, cancel or alter any such rules.*

25 Every Mohammadan registrar shall be, and be deemed to be, a public officer, and his duties under this Act shall be deemed to be public duties. Mohammadan registrar a public officer.

26. Nothing in this Act contained shall be construed to Saving clause.

(*a*) render invalid, merely by reason of its not having been registered, any Mohammadan marriage or divorce which would otherwise be valid;

(*b*) render valid, by reason of its having been registered, any Mohammadan marriage or divorce which would otherwise be invalid;

(*c*) authorize the attendance of any Mohammadan registrar at the celebration of a marriage, except at the request of all the parties concerned;

(*d*) affect the religion or religious rites and usages of any of Her Majesty's subjects in India;

(*e*) prevent any person, who is unable to write, from putting his mark, instead of the signature required by this Act.

SCHEDULE—*(see sections 6 and 11).*

Form A. Book I.

Register of Marriages (as prescribed by section 6 of the Act for the voluntary Registration of Mohammadan Marriages and Divorces).

1. Consecutive number.

2. Name of the bridegroom and that of his father, with their respective residences.

3. Name of the bride and that of her father, with their respective residences.

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* See *Calcutta Gazette*, March 29, 1876, part i., p. 295; *ibid.*, April 5, part i., pp. 316—320; *ibid.*, Aug. 23, 1876, part i., p. 1053.

4. Whether the bride is a spinster, a widow, or divorced by a former husband, and whether she is adult or otherwise.

5.* Name of the guardian of the bridegroom (if the bridegroom be a minor) and that of the guardian's father, with specification of the guardian's residence, and of the relationship in which he stands to the bridegroom.

6.* Name of the guardian of the bride (if she be a minor) and that of his father, with specification of his residence, and the relationship in which he stands to the bride.

7.† Name of the bride's vakíl, and of his father, and their residences, with specification of the relationship in which the vakíl stands to the bride.

8.† Names of the witnesses to the due authorization of the bride's vakíl, with names of their fathers and residences, and specification of the relationship in which they stand to the bride.

9. Date on which the marriage was contracted—to be given according to the English style and according to the era current in the district.

10. Amount of dower.

11. How much of the dower is mu'ajjal (prompt) and how much mu'wajjal (deferred).

12. Whether any portion of the dower was paid at the moment. If so, how much.

13. Whether any property was given in lieu of the whole or any portion of the dower, with specification of the same.

14. Special conditions (if any).

15. Names of village or town, police-jurisdiction, and district in which the marriage took place.

16. Name of the person in whose house the marriage-ceremony took place, and that of his father.

17. Date of registration—to be given according to the English style.

Form B. Book II.

Register of Divorces other than those of the kind known as Khula (prescribed by section 6 of the Act for the voluntary Registration of Mohammadan Marriages and Divorces).

1. Consecutive number.

2. Names of the husband and of his father, and their residences.

3. Names of the wife and of her father, and their residences.

4. Date of divorce—according to the English style and according to the era current in the district.

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* These columns will be blank if the bride and bridegroom, respectively, are not represented by guardians.

† These columns will be blank when the bride is not represented by a vakíl.

5. Description of divorce.

6. Manner in which the divorce was effected.

7. Names of the village or town, police-jurisdiction, and district in which the divorce took place.

8. Name of the party in whose house the divorce took place, and of his father.

9. Names of witnesses to the divorce (if any), the names of their fathers, and their respective residences.

10. Name of party identifying the husband before the Mohammadan registrar, and that of his father, and their residences.

11. Date of registration—to be given according to the English style.

FORM C. BOOK III.

Register of Divorces of the kind known as Khula (prescribed by section 6 of the Act for the voluntary Registration of Mohammadan Marriages and Divorces).

1. Consecutive number.

2. Name of the husband and that of his father, and their residences.

3. Name of the wife and that of her father, and their residences.

4. Date of *Khula*—according to the English style and according to the era current in the district.

5. Amount of dower.

6. Whether *Khula* was acknowledged by the wife in person before the Mohammadan registrar.

7. If so, name of the party identifying her before the Mohammadan registrar, and that of his father, and their residences, with specification of the relationship which he bears to her (if any).

8.* If the *Khula* be acknowledged before the Mohammadan registrar by the wife's vakíl, his name and that of his father, and their residences, with specification of the relationship which the vakíl bears to the wife (if any).

9. Names of the two witnesses to the due authorization of the wife's vakíl and those of their fathers, with their residences.

10 Name of village or town, police-jurisdiction, and district where the *Khula* took place.

11 Name of the person in whose house the *Khula* took place, and that of his father.

12. Names of the witnesses (if any) to the divorce being effected, the names of their fathers, and their residences.

13. Name of the person identifying the husband, and that of his father and their residences.

14. Date of registration—to be given in the English style.

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* This column will be blank if the woman is not represented by a vakil.

REVISED RULES UNDER SECTIONS 18 AND 24 OF ACT I. (B.C.) OF 1876 (AN ACT TO PROVIDE FOR THE VOLUNTARY REGISTRATION OF MOHAMMADAN MARRIAGES AND DIVORCES).

Nomination of Mohammadan registrars.

1. As soon as the Act has been extended to any district under section 1, the District Registrar shall nominate a sufficient number of persons to be licensed as Mohammadan registrars under section 3. He shall also specify the limits within which each of the persons so nominated shall exercise the functions of Mohammadan registrar.

Form of application.

2. The District Registrar's nomination shall be submitted to the Inspector-General of Registration, and shall be accompanied by the original application of each nominee in the form below, and also by a certificate of good moral character signed by three Mohammadan gentlemen of known respectability and position, and countersigned by the District Magistrate :—

Application for a Mohammadan Registrarship under Act I. of 1876 *(an Act to provide for the voluntary Registration of Mohammadan Marriages and Divorces) at , thana , district of*

Name (in English) and usual signature of candidate; date of application, and address in full.	Age.	Profession or present employment of candidate, with present salary or pension.	Father's name and profession.	Present family residence of canditate.	Distance of residence from proposed Registry Office and Sudder Station.	Whether candidate has a masonry house for office.	If previously employed under Government, details of past service: if ever dismissed from any post, particulars of the fact.	Names and addresses of persons recommending the candidate.	Whether candidate can write Arabic, Persian, Urdu, Bengali, and English.	Whether candidate is acquainted with Mohammadan law, and holds a certificate from any Government Madrassa.	Remarks of District Officer or Inspector-General of Assurances, which, if favourable, may include the thanas to form the jurisdiction.	REMARKS.
1	2	3	4	5	6	7	8	9	10	11	12	13

3. In the selection of Mohammadan registrars, perference shall ordinarily be given to ex-kazis and Government pensioners, being Mohammadans, who reside, or are willing to reside, at a convenient place within the limits of the proposed jurisdiction; but no person shall be appointed a Mohammadan registrar merely by reason of some supposed hereditary right. A sub-registrar of assurances may be nominated as Mohammadan registrar, provided he be a Mohammadan and is otherwise qualified. Who may be nominated.

4. The limits within which a Mohammadan registrar shall be licensed to act shall for the present coincide with the limits of a sub-district under the Indian Registration Act, or with the jurisdiction of a police-station. The head-quarters shall be at some convenient place within those limits. Jurisdiction.

5. The District Registrar's nomination, with the accompanying applications and certificates, shall be forwarded to Government by the Inspector-General of Registration with his remarks and recommendation.

6. Should such a course appear expedient hereafter, all Mohammadan registrars who may have been appointed under these rules, and all future applicants for licenses, shall be liable to examination in the following subjects:— Liability to examination.

(1) Arabic and vernacular of the district.

(2) Mohammadan law of marriage and divorce.

(3) Act I. of 1876 (B.C.), and the rules.

And if any person who has been appointed a Mohammadan registrar fail to pass such examination, his license will be liable to be cancelled. Such examination may be held at such times and places, and by such examiners, as the Lieutenant-Governor may from time to time appoint.

7. Licenses to qualified persons who have been approved of as Mohammadan registrars will be granted in the following form:— Form of license.

License under section 3, Act I. (B.C.) of 1876.

To

of

Calcutta, the 187

By virtue of the authority conferred upon His Honor the Lieutenant-Governor of Bengal by Act I. (B.C.) of 1876, you are hereby authorized to register, in the manner prescribed by the above Act, all Mohammadan marriages and divorces which shall be effected within on application being made to you for such registration.

2. It will be your duty carefully to observe the provisions of the above-mentioned Act, and such rules as may from time to time be prescribed by His Honor the Lieutenant-Governor, in pursuance of the power conferred upon him by the above Act.

3. This license shall continue in force until it is revoked or suspended by the said Lieutenant-Governor of Bengal.

By order of His Honor the Lieutenant-Governor of Bengal,

Secretary to the Government of Bengal.

Registration of license.

8. When a Mohammadan registrar desires to give up his license, or is about to leave the place or district in which he has exercised the functions of Mohammadan registrar, he shall report the circumstances through the District Registrar to the Inspector-General of Assurances for the orders of Government.

Change of officers.

9. When a Mohammadan registrar makes over charge of his office to a licensed successor, a certificate shall be jointly given for the date on which the office is made over, and of the safety and correctness of the records; and this certificate shall be forwarded by the District Registrar to the Inspector-General.

10. Mohammadan registrars shall not be entitled to leave as of right under the rules in force for Government servants. The District Registrar may, however, grant leave in cases of urgency, but no leave exceeding one month shall be granted without the previous sanction of the Inspector-General. All leave shall be at once reported to that officer, together with the arrangements made for carrying on the duties of the Mohammadan registrar. Leave.

11. In cases of leave or absence from duty, the next nearest Mohammadan registrar shall ordinarily be appointed to carry on the duties of the absentee in addition to his own.

12. It is not intended that service as a Mohammadan registrar shall count as Government service, so as to give rise to any claim for pension or gratuity, or to leave allowances of any kind; but it is not intended by this to preclude the appointment of sub-registrars or retired Government servants to be Mohammadan registrars. Not entitled to pension.

13. The general control and supervision of the working of the Act shall be exercised by the present inspecting staff attached to the Department for the Registration of Assurances. General control.

14. The registers, forms, and seal to be used by a Mohammadan registrar, shall be such only as are supplied by Government under section 5 of the Act. The Government shall also supply writing ink; and no ink shall be used for making entries in the registers and indexes other than that supplied. The Government may also supply such other articles of stationery as are requisite. All such registers, forms, seals, ink, and other articles, shall be charged at cost price, and shall ordinarily be paid for by the Mohammadan registrar at the time they are supplied. But in any case, when the District Registrar thinks it necessary, he may defer the realization of the charge for a term not exceeding Books and stationery.

three months. In case of failure to pay at the prescribed period, the District Registrar should report the case for orders to the Inspector-General of Registration.

Custody of seals.

15. The seal shall always remain in the personal custody of the Mohammadan registrar, and shall be made over with the records to the officer appointed to receive the same whenever a Mohammadan registrar ceases, either temporarily or permanently, to exercise his functions.

Table of fees.

16. A printed table of fees in the vernacular of the district shall be suspended in some conspicuous place in every Mohammadan registrar's office.

Disposal of fees.

17. The fees received by a Mohammadan registrar under sections 9 and 16 of the Act, and rules 21 and 50, may be retained by him as his lawful remuneration, provided that he duly pays for the registers and other articles supplied to him under rule 14. All fees received by a District Registrar shall be credited to Government in the same way as fees realized under the Indian Registration Act.

Attendance at marriages.

18. When the attendance of a Mohammadan registrar is required at the celebration of a marriage, the party requiring his attendance may make an application to the Mohammadan registrar, specifying the place and time of the marriage, and that officer may attend.

19. It shall be lawful for a Mohammadan registrar to travel on circuit within his jurisdiction for the purpose of attending at the celebration of marriages, provided that at least 15 days before the beginning of each month he affix at his office a public notice specifying the dates on which he will be at the several places which he purposes to visit; and on a written application made by any resident of such place, not less than one week before the date so fixed, he shall be bound to attend at the house of such resident at the time fixed for the celebration of the marriage.

20. Priority of application shall in all cases determine the order in which the Mohammadan registrar shall be bound to attend such marriages in case any question of precedence arise.

21. Mohammadan registrars are at liberty to make their own terms as regards the extra fees to be given them for attending marriages. They are, however, prohibited from demanding fees beyond the following scale :—

(1) For attending a marriage under rule 18 at a place and time fixed by the parties, Rs. 10, plus travelling expenses at the rate of four annas a mile.

(2) For attending the celebration of a marriage under rule 19 at a place and time fixed by the Registrar himself, Rs. 2. In such cases no travelling expenses will be charged.

22. When a Mohammadan registrar is present at the celebration of a marriage, he shall make an entry of the fact in the Register of Marriages (A); and a copy of such entry shall be included in the copies to be made under sections 12, 15, and 22 of the Act.

Procedure on application to registrar in absence of any of the parties.

23. If all the persons who, by section 11 of the Act, are required to sign the entry of the marriage or divorce in the proper register, are not present, registration shall be deferred until they are all present; provided that no marriage or divorce for registration of which application has been made within one month, as required by section 9, shall be registered after the expiration of three months from the date on which the marriage or divorce was effected.

Procedure before registration.

24. The Mohammadan registrar shall satisfy himself whether or not a marriage was effected by the persons by whom it is represented to have been effected in the following manner :—

(1) by examining the parties to the marriage, or, if either or both of them are minors, their lawful guardians. If the woman be a *parda-nishin*, her duly authorized vakíl shall be examined instead of the woman ;

(2) by examining the two witnesses who were present at the marriage.

25. The Mohammadan registrar shall satisfy himself whether or not a divorce, other than the kind known as *khula*, was effected by the man by whom it is represented to have been effected by examining that man ; and if he be of the Shiá sect, by also examining the two witnesses to the divorce being effected.

26. The Mohammadan registrar shall satisfy himself that a divorce of the kind known as *khula* was effected by the persons by whom it was represented to have been effected in the following manner :—

(1) by examining the parties to the *khula*, provided that if the woman be a *parda-nishin*, her duly constituted vakíl shall be examined instead of the woman ;

(2) if the man be of the Shiá sect, by also examining the two witnesses to the divorce being effected.

27. The Mohammadan registrar shall satisfy himself of the identity of persons appearing before him as witnesses of a marriage or divorce, unless they are otherwise personally known to him, by examining at least one witness to the identity of each person so appearing.

28. In the case of any person appearing as the representative of the man or woman (whether he appears as guardian or vakíl), the Mohammadan registrar shall satisfy himself of the right of such person to appear by examining such person. If a vakíl so appear, the Mohammadan registrar shall

further examine witnesses to the fact of the vakíl having been duly authorized to appear.

29. When the entry of the marriage or divorce has been made in the proper register, it shall be read over by the Mohammadan registrar to the persons who, by section 11, are required to sign such entry. If they admit its correctness, the entry shall then be signed by them.

30 When a person who cannot write signs his name by means of a mark, his name shall be recorded at length, and the writer shall also sign his name in attestation that the mark was affixed in his presence.

Correction of errors.

31. If a Mohammadan registrar discovers any error in the form or substance of any entry of a marriage or divorce made by him, he may within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of such correction, and he shall also make the like marginal entry in the copies thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And, in case a copy has been already sent to the registrar, such person shall make and send another copy thereof, containing both the original erroneous entry and the marginal correction therein made.

32. No erasures shall be made with a knife in any register book or record, but mistakes shall be corrected when necessary with the pen, and shall be invariably attested by the registering officer. Corrections are not to be obliterated or blotted out, so as to be illegible, but a line is to be drawn

through erroneous words with the pen, so that they may remain legible.

Refusal to register.

33. The circumstances under which registration of a marriage or divorce should be refused are as follows :—

(1) If the marriage or divorce was not effected within the jurisdiction of the marriage-registrar to whom application for registration is made.

(2) If the application is not made by the persons specified in section 8 of the Act.

(3) If application has been made after the expiry of one month from the date on which the marriage or divorce was effected.

(4) If all the persons required by section 11 to sign the entry in the proper register fail to appear within the time limited for such appearance by the Mohammadan registrar under rule 24.

(5) If the Mohammadan registrar fail to satisfy himself that the marriage or divorce was effected by the person or persons by whom it is represented to have been effected.

(6) If the Mohammadan registrar fail to satisfy himself as to the identity of the persons appearing before him and alleging that the marriage has been effected.

(7) In the case of any person appearing as the representative of the man or woman (whether he appear as guardian or as vakíl), if the Mohammadan registrar fail to satisfy himself of the right of such person to appear.

(8) If one of the parties applying for registration of marriage, or if the man applying for the divorce, appear to be of unsound mind.

34. In cases 2 and 8 the order of refusal shall ordinarily be deferred till one month has elapsed from the date on which the marriage or divorce was effected; but if the parties declare their inability to comply with the requirements of the law, or for any other reason wish that registration should at once be refused, this may be done. Refusal deferred.

35. The reasons for refusal to register to be recorded under section 20 shall be concisely and clearly stated in each particular case. When registration is refused under clause 5, 6, or 7 of rule 34, the Mohammadan registrar shall record the grounds of his decision.

36. Fees paid under section 9 shall not be refunded unless registration is refused for one of the reasons numbered (1), (2), (3), and (8) in rule 34. Fees and travelling allowances paid for the attendance of Mohammadan registrars at the celebration of marriages shall be refunded only in cases where the Mohammadan registrar does not attend. Fees paid for searches in the registers and indexes, or for copies of entries, shall be refunded only when the searches are not made or the copies not given. In what cases fees may be refunded

37. The refund of fees paid to a Mohammadan registrar shall be made by him at once on application, and he shall take and file a receipt for the amount of such repayment from the person to whom it is made. Manner of refund.

38. When a register book is closed a certificate to that effect shall be appended at the close of the written portion, and a certificate showing the number of pages written upon shall be entered on the first page. Certificate of closure of volume.

39. The registers and indexes shall be kept in Urdu. Language to be used.

40. The "year" referred to in section 7 of the Act shall be a year of the Christian era, commencing on the 1st January and ending on the 31st December.

Indexes.

41. The index to marriages and divorces shall be prepared from registers A, B, and C, and contain the following particulars :—

1. Name of party.
2. Father's names.
3. Residence.*
4. Place of registration.
5. Year of registration.
6. Serial number for the year.
7. Book.
8. Volume.
9. Page.

42. Names shall be indexed according to their first letter, and shall be arranged in the order of the Urdu alphabet. A mere title or designation of race shall not be taken as the index word.

Thus Shaikh Ramzan will be indexed Ramzan, Shaikh; Mir Aulad Ali—Aulad Ali, Mir.

Catalogue.

43. A catalogue in form given below shall be kept up and permanently preserved in every Mohammadan registrar's office, and on the occasion of every transfer of records the officer receiving charge of the records shall compare them with the catalogue and certify therein that he has found them correct. Whenever any of the records are transferred to the district office, the fact shall be noted in the column of remarks, together with the date of transfer :—

* Residence includes village or town, police-station, and district.

Form of Catalogue.

Serial No.	District or sub-district to which the books relate.	Year	Title of book.	Volume.	Number of entries in each.	Number of pages written on	REMARKS.

44. In district offices the following records shall be preserved in perpetuity:—

All register-books A, B, and C, and their indexes.

The catalogue.

Register of refusals.

Register of appeals.

Reports of the destruction of records, and list of papers destroyed.

45. The following records may be destroyed after the expiration of three full years from the period to which they relate:— Destruction of records.

Applications for registration or for attendance at the celebration of marriages under rules 18—19.

Applications for search or copies of extracts.

All correspondence, whether in the vernacular or in English, which is of an ordinary routine character, and which the registrar considers may be destroyed.

46. No records or papers whatever shall be destroyed without the previous sanction of the Inspector-General.

Search and copies.

47. Applications for search in the records, or for copies of extracts therefrom, shall be made in writing; no stamp shall be required on such applications. Applications made to the District Registrar shall be entered in the register kept by him for that purpose. Applications made to the Mohammadan registrar shall be filed by him, the date of application and the date on which a search was made, or a copy delivered, being noted on the back of the application. If the register from which an extract is required has been transferred to the District Registrar or other person under section 23, the application, together with the prescribed fee, shall be forwarded by the Mohammadan registrar to such District Registrar or other person at the expense of the applicant.

48. A call for information from any court shall, if it necessitates search in the registers, be accompanied by the necessary fee for search. Officers of Government shall be permitted to inspect the registers without fee; but if the production of a register in any court is required, it shall be produced by the Mohammadan registrar or other officer whom the District Registrar may depute for the purpose, who will be entitled to claim payment of his expenses like any other witness.

49. Besides the fees leviable under section 16 of the Act, a fee of eight annas may be charged for extracts and copies of orders and records not otherwise provided for in the law.

R. L. MANGLES,
Offg. Secy. to the Govt. of Bengal.

The 19th August 1876.

THE INDIAN LIMITATION ACT.

No. XV. OF 1877.

An Act for the Limitation of Suits, and for other purposes.

SCHEDULE II.

FIRST DIVISION—SUITS.

No.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
103	By a Mohammadan for exigible dower (Mu'ajjal).	Three years.	When the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce.
104	By a Mohammadan for deferred dower (Mu'wajjal).	Ditto.	When the marriage is dissolved by death or divorce.
125	Suit during the life of a Hindu or Mohammadan female by a Hindu or Mohammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years.	The date of the alienation.
141	Suit by a Hindu or Mohammadan entitled to possession of immoveable property on the death of a Hindu or Mohammadan female	Ditto.	When the female dies.

EXTRACTS.

ORIGIN OF MOHAMMADAN LAW.

(Shamachurn Sircar's Mohammadan Law, Part I., pp. 3 to 25 : Tagore Law Lectures, 1873.)

THE origin of this law is '*Al-Kurán*,' or '*The Kurán*;' and the *Kurán* is believed by the orthodox Musalmáns to have existed from eternity, subsisting in the very essence of God. The Prophet himself declared that it was revealed to him by the Angel Gabriel in various portions, and at different times. Its texts are held by the Muhammadans to be unquestionable and decisive, as being the words of God (Kalámullah), transmitted to man through their Prophet, or, as he is emphatically called (by the believers), "the last of Prophets, Muhammad, the Apostle of God." Besides inculcating religion and theology, the *Kurán* contains also passages which are applicable to jurisprudence, and form the principal basis of the *Sharaa*. Thus the law of the Musulmáns is founded upon revelation and blended with their religion, the *Kurán* being the fountain-head and first authority of all their laws, religious, civil, and criminal. But whenever the *Kurán* was not applicable to any particular case, which happened as the social relations and wants of the Muhammadans became more extended, recourse was had to supplement its silence to the *Sunnat* or *Sunnah*,*—that is, to whatever the Prophet had done, said, or tacitly allowed; and also to *Hadis*,†—that is, to the Prophet's sayings, or the narration of what was said or done by him, or was in silence

* When in the nominative case of the singular number, the word '*Sunnat*' is commonly pronounced '*Sunnah*.'

† Hadis, though in the singular number (having Ahadis for its plural), is in law generally used in the plural sense.

upheld by him. All these are considered by the orthodox Muhammadans to be the supplement to the *Kurán*, and nearly of equal authority. The Sunnat and Hadís never were committed to writing by, or in the time of, the Arabian Legislator. At the time of Muhammad's death, the Sunnat with the *Kurán* formed the whole body of the Law. "I leave with you," said the Prophet, "two things, which, so long as you adhere to them, will preserve you from error. These are the book of God and my Sunnat."

After the death of Muhammad various competitors came forward claiming to succeed to the Khiláfat,[1] and divided the people into rival and discordant factions.

But, notwithstanding that, the Sunnat, as well as Hadís, was preserved, from hand to hand, by authorized persons, and applied to many questions relating to things, both temporal and spiritual, touched upon in the *Kurán*. After Muhammad's death, the Sunnat and Hadís, though not recorded, were cited by his surviving companions in order to decide occasional disputes, and to restrain men from certain actions which the Prophet prohibited: and thus, in the process of time, they became the standard of judicial determination.

"The articles of law, or, in other terms, the commandments and prohibitions of God," says Ibnu Khaldún, "were then borne (not in books, but) in the hearts of men, who knew that these maxims drew their origin from the book of God and from the doings and sayings of the Prophet. Under these circumstances, the traditions very soon increased to such an extent that it became not only advisable, but also necessary, to make collections of them, and to separate those which were authentic from those which were of doubtful authority."

* * * * *

1 'Khiláfat' signifies viceregency, lieutenancy, as well as imperial dignity.

Although the *Kurán* was believed and received by all the Muhammadans as the words of the Most High, yet the discrepant interpretations of many of the material parts thereof given by the different expositors, the difference of opinion among the learned as to the principles or articles of faith (usúl), the admission of particular Ahádís by some doctors, and the rejection of the same by others, also the difference in the acknowledgment of a particular person or persons as being the Imám or Imáms, created different sets of doctrines; and the followers of each of such sets constituted a particular sect.[1]

* * * * * *

In addition to the *Kurán*, Sunnat and Hadis, there are the *Ijmaa* (concurrence), and Kiyás (ratiocination), which respectively form the third and fourth sources of Muhammadan law. The *Ijmaa* is composed of the decisions and determinations of the Prophet's companions (Sahábah), their disciples, the pupils of the latter (Tábiún), and other learned men. Like the Sunnat, the *Ijmaa* too was originally preserved in memory by learned men, who made the study and memorial preservation of the Sunnat and *Ijmaa*, as well as of the *Kurán*, their special duty. These learned men were called 'Iláfiz'[2] (preserver in memory), and in communicating their narratives to their disciples

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1 The sects so formed are seventy-three in number. Of these seventy-three sects, ten are stated in the Ghuníyat-ut-Tálibín to be the principal, namely,—1—The Sunní; 2—Kháriji; 3—Shíah; 4—Muatizili; 5—Murjiyah; 6—Mushabbihah; 7—Juhmiyah; 8—Zaráriyah; 9—Najjáriyah; and 10—Kilábiyah. Of these, the Sunnís constitute but one general sect, the Khárijís are sub-divided into fifteen classes, the Muatizilís into six, the Murjiyahs into twelve, and the Shíahs into thirty-two, and the Juhmiyahs, Najjáriyahs, Zaráriyahs, and Kilábiyahs form one sect each.

2 The appellation of Háfiz has been recently given to any one who knows the *Kurán* by heart; but formerly it was used by the Sunní Doctors to designate those who had committed to memory the *Kurán*, the Sunnat and the six sahíhs or collections of Ahádís, and who could cite the Isnád with discrimination.

they made mention of the persons from and through whom those had successively passed before they came into their possession. This mention is termed Isnád[1] (support), and according to the credibility attached to the narratives whose names are cited as Isnád depended the authenticity and authority of the tradition and *Ijmaa* so related.

The Kiyás (ratiocination) which is the fourth source of the Muhammadan law among the Sunnís, and which consists of analogical deductions, derived from a comparison of the *Kurán*, the Hadís and the Ijmaa, when these do not apply either collectively or individually to any particular case, is also allowed, with a greater or less extension of limit, by the different sects of the Sunnís; some, however, refusing its authority altogether.

Although the *Kurán*, the traditions (or Hadís, including Sunnat), the *Ijmaa* and the *Kiyás* are the four sources upon which the law of the Sunnís is based, the *Kurán* being the origin thereof, the *Hadís*, the second in authority to the *Kurán*, the *Ijmaa*, the third, and the *Kiyás*, the fourth, and although these are received in common by the Sunní sect, yet the circumstance of particular traditions being collected by some compilers, and not by others, also that of some traditions being received as authoritative by certain Doctors and rejected by others, also that of different constructions being put to, and interpretations given of, several of the *Ahádís* by the commentators thereof, and also that of the Doctors considerably differing in their conclusions, as well as the difference in the exercise of *Kiyás*, has given rise to different sets of opinions or doctrines within the sect itself.

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1 An allegation on the authority of another, whence "support."

BASIS OF MUHAMMADAN LAW.

(Macnaghten's Preliminary Remarks, Muhammadan Law.)

THE provisions of the Muhammadan Law of Inheritance have for their basis the following passages of the *Kurán*:—"God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath, and his debts be paid. *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath, and the debts be paid: they also shall have the fourth part of what ye shall leave in case ye have no issue; but, if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath, and your debts be paid: and if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number, they shall all be equal sharers in the third part, after payment of the legacies which shall be bequeathed and the debts, without prejudice to the

heirs."[1] "They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have between them two-third parts of what he shall leave: and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."[2]

FURAIZ OR INHERITANCE.

(*Baillie's Digest of Muhammadan Law, pp.* 693—704.)

Definition.

'FURAIZ' is the plural of *fureezut*, a derivative from *furz*, which, as rendered in the dictionaries, means, 'appointment, precision, explanation,' and is applied in law to anything that is established by precise and conclusive evidence. This branch of law is termed *furaiz*, because the *siham*, or shares, in a deceased person's property, have been expressly appointed or ordained, and are based or established on precise and conclusive evidence. So that there is an agreement between the ordinary and legal acceptations of the word.

Funeral expenses are first to be paid.

The estate of a deceased person is applicable to four different purposes—his funeral, his debts, his legacies, and the claims of his heirs. The funeral comprises the washing, shrouding, and interring of his body; all of which are to be performed in a manner suitable to his condition; and for the necessary expenses incurred thereby, all his property is liable, save only property which is subject to some special charge, as a pledge, for instance, to which the pledgee has a preferable right.

1 Sale's *Kurán*, pp. 94 and 95, Vol. I. 2 Sale's *Kurán*, p. 127.

Then debts.

Debts are next to be paid; and debts may be wholly of health or wholly of sickness, or partly of health and partly of sickness. If they are wholly debts of health, or wholly debts of sickness, they are all alike, and none is entitled to any preference. If they are partly debts of health, and partly debts of sickness, the former are preferred if the latter can be established only by the acknowledgment of the deceased. But when the debts of sickness can be established by proof, or have been openly incurred for known causes, such as the purchase or destruction of property, or the proper dower of a wife, the debts of sickness are on the same footing as those of health. Debts not actually due at the time of the debtor's death, become payable immediately on the occurrence of that event, because the privilege of postponement is a personal right which dies with him. The death of a creditor has not the same effect, because the person to whom the right of delay belongs is still alive.[1]

Next legacies to the extent of a third of the residue.

Legacies are next to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. Then the residue is to be divided among the heirs, according to their shares in the inheritance. This, or the preference of a legatee to the heirs, is only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference. Nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator's estate.

Grounds of inheritance.

The right to inheritance is founded on three different qualities—*nusub*, which is *kurabat*, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is

1 *Jowhurrut-oon-Neyyeyah*, Chap. *Morabuhut*.

invalid or void, according to all;[1] and *wula*, which is of two kinds—*wula* of emancipation, and *wula* of *moowalat*, or mutual friendship; the superior being the heir to the inferior in both kinds, and not the inferior to the superior, unless when there is a special condition, as when he has said, 'If I die, my property is an inheritance to these,' when the inferior would be heir to the superior.

Three different kinds of heirs.

There are three different kinds of heirs—*ashab ool furaiz*, or sharers, *asubát*,[2] or agnates, and *zuvool arham*, or uterine relatives. The two last have been termed, from their position in the inheritance, residuaries and distant kindred.[3] The sharers are first; then the residuary by *nusub*, or kindred; then the residuary for special cause, or the emancipator, whether male or female;[4] then the residuary of the emancipator. After this, there is the return, that is, when there are sharers, but none of these residuaries, the surplus, if any, reverts to the sharers. Next are the distant kindred. After them the *mowla* of mutual friendship. Then a person in whose favour the deceased has made a declaration of *nusub*, or descent, as against another, but not such as to establish his descent, and has persisted in such declaration to his death. In this, three conditions are implied. The declaration of descent must be as against another, as, for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son. The declaration must be such as not to establish the descent of the person acknowledged, as when it is not acquiesced in

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1 *Doorr ool Mookhtar*, p. 352, from which it appears that, with regard to this effect of an invalid marriage, there was no difference of opinion between Aboo Huneefá and his two disciples.

2 Pl. of *asubut*, usually pronounced *asubah*.

3 By Sir William Jones, in his translation of the *Sirajiyyah*.

4. *Shureefea*, p. 9.

by the father. And the acknowledger must die without retracting his acknowledgment.[1] The person next in succession is one to whom the deceased has bequeathed the whole of his property. And, lastly, the *beit-ool-mal*, or public treasury.

Of Sharers.

Twelve sharers.

Sharers are all those for whom shares have been appointed or ordained in the sacred text, the traditions, or with general assent. And they are in number twelve persons; of whom the rights of ten are founded on *nusub* or kindred, and of two, on special causes. Of the former there are three males, and seven females. The first of the males is the father, who has three states or conditions: one, when he has merely a share, which is a *sixth;* and it is when the deceased has left a son's son, how low soever. Another, when he is merely the residuary; and that is when there is no successor but himself, and he takes the whole property as residuary, or when there is only a sharer with him, who is not a child, nor child of a son (how low soever), as a husband, a mother, or a grandmother, and the sharer takes his share, and the father takes what remains as residuary. And the third state is when he is both a sharer and the residuary; as when there are with him a daughter and a son's daughter, and he has a sixth as a sharer, the daughter, a half, or two-thirds when there are two or more daughters,—the son's daughter, a sixth, and the father, the remainder as residuary. The second of the males, entitled by *nusub*, is the true grandfather, and he is defined to be one into whose line of relationship to the deceased no mother enters,

Ten of which are by *nusub*.

Three males.
1. The father.

2. True grandfather.

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1 *Shureefea*, p. 11.

as the father's father, or the father's father's father; one into whose relationship to the deceased a mother enters being termed a false grandfather, as the father of the father's mother. The true grandfather is entirely excluded by the father; but in default of him comes into his place, save that he does not, like him, reduce a mother's share to a third of the residue, nor entirely exclude a paternal grandmother. He excludes, however, all the brothers and sisters of the deceased, according to Aboo Huneefa, with whom the *futwa* concurs. The third of the males entitled by *nusub* is the half brother by the mother, whose share, when there is but one, is a sixth; or when there are two or more of them, a third, which is equally divided among them all.

False grandfather who?

β. Half brother by the mother.

Of females who are entitled by *nusub*, the first is the daughter, whose share, when she is alone, is a half; and when there are two or more daughters, they have two-thirds between them. When there are both sons and daughters, the sons make the daughters residuaries with them, the share of each son being equal to that of two daughters. The second are the son's daughters, who, when there is no child of the loins, are like daughters, one taking a half, and two or more taking two-thirds between them. When there is a son, the children of a son take nothing; when there is one daughter, she takes a *half*, and the son's daughters have a sixth; and if there are two daughters, they take *two-thirds*, and there is nothing for the son's daughters. That is, when there is no male among the children of a son; but if there is a male, he makes the females (whether his sisters or cousins) residuaries with him, so that if there were two daughters or more of the loins, they could have two-thirds between them, and the remainder would pass to the children of the son, in the proportion

Seven females:—
1. The daughter.

2. Son's daughter.

of two parts to the males and one part to the females. Though the male were in a grade below them, he would make them residuaries with him; so that the remainder would be between him and them in the same proportion, or two parts to each male, and one to each female. Thus if there were two daughters, a son's daughter, the daughter of a son's son, and the son of a son's son, the daughters would take two-thirds, and the remainder be between the son's daughter and all below her, in the proportion of two parts to the male, and one part to each female. The principle in this case is that a son's daughter becomes a residuary with a son's son, whether he is in the same or a lower grade with herself, when she is not a sharer.[1] The third of the females entitled by *nusub* is the mother, who, like the father, has three states or conditions. One, when there is with her a child or child of a son, how low soever, or two or more brothers or sisters of the whole or half blood, and on whatever side they may be, and then her share is a *sixth*. Another, when there are none of these, and then her share is a *third*. And a third case is when there is a husband or a wife, and both parents; and then the mother has a third of what remains, after deducting the share of the husband or wife, and the residue is to the father according to all opinions. But if in the place of the father there were a grandfather, the mother would have a third of the whole property for her share. The fourth is the true grandmother, as the mother's mother, how high soever, and the father's mother, how high soever. Everyone into whose line of relationship to the deceased a mother enters between two fathers, is a false grandmother. The share of the true grandmother, on the father's or the

3. The mother.

4. The true grandmother.

False grandmother who?

1 This qualification prevents any injury to her by the application of the principle. See *M. L. I.*, second edition, p. 39.

mother's side, is a *sixth*, whether there be one or more; all partaking of it equally who are in the same degree. When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, Aboo Yoosuf has said, and there is one report to the same effect from Aboo Huneefa, that the *sixth* is to be divided between them equally, and the *futwa* is in accordance with this opinion. The fifth are full sisters, and their share is a *half* when there is only one, and *two-thirds* when there are two or more. When there is a full brother with them, the male has the share of two females; and when there are daughters, or daughters of a son, the full sisters take the residue.[1] The sixth are half sisters by the father, and they are like full sisters when there are none, one taking a *half* and two or more *two-thirds* in that case; with one full sister, they take a *sixth*, which makes up the two-thirds. But with two full sisters they have no portion in the inheritance, unless there happens to be with them a half brother by the father, to make them residuaries, when the full sisters take their two-thirds, and the children of the father only have the residue between them, in the proportion of two parts to the male, and one part to each female. The seventh are half sisters by the mother; of whom, when there is one, she takes a *sixth*, and when there are two or more, they take a third. But all brothers and sisters are excluded by a son or son's son, how low soever, or a father, by general agreement, and also by a grandfather, according to Aboo Huneefa. And children of the father (that is, half brothers and sisters on his side) are excluded not only by these, but also by a full brother; and children of the mother (or half brothers and sisters on her side), are excluded by a child, though a daughter, and by the child of a son, a father, and a grandfather, by general agreement.

5. Full sisters.

6. Half sisters by the father.

7. Half sisters by the mother.

1 For the reason, see *M. L. I.*, Second Edition, p. 40.

Sharers for special cause. Husband.

The two sharers who are entitled for special cause are the husband and wife. The share of a husband is a *half*, when there is no child nor child of a son, how low soever; and a *fourth* with a child or child of a son. The wife's share is a *fourth* in the former of these cases, and an *eighth*, in the latter; the fourth or eighth, as the case may be, being equally divided among all the wives, when there are more than one.

Number of shares, and the persons entitled to them. A half.

The shares appointed or ordained by the sacred text are six in number:—a half, a fourth, an eighth, and two-thirds, one-third, and a sixth. A half is appointed for five different persons. It is the share of a husband when the deceased has left neither a child nor child of a son; the share of one daughter of the loins, and the share of a son's daughter, when there is no daughter of the loins; and the share of the full sister, and of the half sister on the father's side, when

A fourth.

there is no full sister. A fourth is the share of two persons, that is, of a husband, when the deceased has left a child, or a child of a son, and of a wife or wives, when he has left

An eighth.

neither child nor child of a son. An eighth is the share of one or more wives, when the deceased has left a child or

Two-thirds.

child of a son. Two-thirds are the share of four different persons—the share of two daughters or more of the loins; the share of two or more daughters of a son, when there is none of the loins; the share of two full sisters or more, or two half sisters by the father, when there is no full

A third.

sister. A third is the share of two persons—that is, of a mother, when the deceased has left neither a child nor child of a son, nor two brothers or sisters; and the share of two children or more of a mother, whether they be male or

A sixth.

female. And a sixth is the share of six persons. The share of a father, when the deceased has left a child or child of a son; the share of a grandfather, when there is no father;

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the share of a mother, when the deceased has left a child or child of a son, or two brothers and sisters; the share of a single grandfather, or of several grandmothers, when there are more at the time of inheriting; the share of a son's daughter with a daughter of the loins, to make up two-thirds; and the share of one child of the mother, whether male or female.

Of Asubát or Residuaries.

Three classes of residuaries.

The Asubát are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied, or the whole estate when there are none. They are of two kinds: residuaries by *nusub*, or kindred to the deceased, and residuaries for special cause. Of the former there are three classes: residuaries by themselves or in their own right, residuaries by another, and residuaries with another.

1. Residuary in his own right.

The residuary by himself or in his own right is defined to be 'every male into whose line of relation to the deceased no female enters'; and such residuaries are of four sorts—the offspring[1] of the deceased, and his root, the offspring of his father, and the offspring of his grandfather. Hence the nearest of the residuaries is the son; then the son's son, how low soever; then the father; then the grandfather, or father's father, how high soever; then the full brother; then the half brother by the father; then the son of the full brother; then the son of the half brother by the father;[2] then the full paternal uncle; then the half paternal uncle by the father; then the son of the full paternal uncle; then the son of the half paternal uncle by the father;[3] then the full paternal uncle of the father;

1 *Jooza*, literally, part of the deceased.

2 Then their sons, how low soever, in the same manner, the full blood being preferred to the half blood at each stage of descent.—*Sirajiyyah*, pp. 48, 49.

3 Then their sons, how low soever.—*Ibid.*

then the half paternal uncle of the father on the father's side; then the son of the father's full paternal uncle; then the son of the father's half paternal uncle on the father's side; then the paternal uncle of the grandfather; then his son, how low soever.[1]

When there are several, the estate is divided equally between them.

When there are several residuaries in the same degree, the property is divided between them by bodies, not by families (*per capita* and not *per stirpes*). As, for instance, when there is a son of one brother and ten sons of another, or the son of one paternal uncle and ten sons of another, the property is to be divided into eleven parts, of which each takes one part.

Residuaries by another.

The residuary by another is every female who becomes or is made a residuary by a male who is parallel to her; and such residuaries are four in number: a daughter by a

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1 The *Mubsoot* is the authority cited, and it is confirmed by the *Doorr ool Mookhtar*, p 854. To these I can now add the *Sirajiyyah*,, though the direct detail of the residuaries stops at the sons of the paternal uncles, and I failed, when preparing 'The Muhammadan Law of Inheritance,' to observe that it is carried, by implication, to the full extent of the paternal uncles of the grandfather. Thus the author, after stating that the son of the full brother is preferred to the son of the half brother by the father, proceeds to say that 'The same rule is applicable to the paternal uncles of the deceased, then to the paternal uncles of his father, and then to the paternal uncles of his grandfather;' words that are plainly inconsistent with a limitation of the succession to the offspring of the 'nearest grandfather,' as might, at first sight, be inferred from Sir William Jones' translations of the passage. See the examination of it in the treatise above mentioned, 1st ed., p. 78, 2nd ed., p. 47. The detail of the residuaries is not carried farther in any of the authorities than the uncles of the grandfather; but it would have been superfluous to do so, as the grandfather had been already defined to be a father's father, *how high soever*. So that the detail is, in reality, co-extensive with the definition, and the succession of residuaries in their own right as unlimited in the collateral as it is in the direct line, where it is expressly said to be 'how low and how high soever.' In several cases decided by the superior Courts in India, descendants of a great-grandfather have been founded entitled to succeed as residuaries. See Bhanoo Beebee *v.* Imam Bukhsh, *Rep. S. D. A. Calcutta*, Vol. I, p. 68; Sheikh Moohummud Buksh *v.* Shurf-oon-Nissa Begum, *M. L. I.*, p. 82; and Mohadeen Ahmud Khan *v.* Syed Mohamed and another, High Court of Madras Reports, Vol. I, p. 92, and *Indian Jurist Reports*, p. 132. See farther, *M. L. I.*, 2nd edition, p. 50, where it is inferred from a passage in the *Shureefeea*, p. 176, that there is no limit to the succession of the residuaries in the collateral, any more than in the direct line.

son, a son's daughter by a son's son, a full sister by her brother, and a half sister by the father by her brother. The remaining residuaries, that is, all besides these, take the residue alone, that is, the males take it without any participation of the females: and they are also four in number: the paternal uncle and his son, the son of a brother, and the son of an emancipator.

Residuaries with another.

The residuary with another is every female who becomes a residuary with another female, as full sisters or half sisters by the father, who become residuaries with daughters or sons' daughters.

Residuaries of a *wulud oozzina*, and son of a *moolánah*.

The residuaries of a *wulud-oozzina* and of the son of an imprecated woman are the *moowalees*[1] of their mothers; for they have no father, and the *kurabut*, or kindred of their mother, inherit to them, and they inherit to them. So that if the son of an imprecated woman should leave a daughter, a mother, and the imprecator, the daughter would take a half, the mother a sixth, and the remainder would revert to them as if he had no father. If besides these there were also a husband or a wife, he or she would take his or her share, and the remainder be between the others, either as share or as return. And if he should leave his mother, a half brother by the mother, and a son of the imprecator, the mother would take a third, the half brother by the mother a sixth, and the remainder would revert to them, there being nothing for the son of the imprecator, as the deceased has no brother on the side of the father. When the child of the son of an imprecated woman dies, the

1 Pl. of *Mowla*, which signifies both emancipator and emancipated, though it also means the son of a paternal uncle. It is here, I think, to be taken in the sense of emancipated; in which sense it occurs in a section of the *Fut. Al.*, Vol. II, p 490, that treats of appropriations for the benefit of *Mowalees*, *moodubburs*, and *oom-i-wuluds*. The mothers in the text would thus be women free by origin who had emancipated slaves, and whose freed men would become residuaries to their illegitimate children. See *Doorr ool Mookhtar*, p. 855.

family of his father inherit to him, being his brothers; but the family of his grandfather, who are his paternal uncles, and their children, do not inherit to him. The same is true of the *wulud-ooz-zina*, except that there is a difference between them in one case, which is that the *tuwam* or twin of the *wulud-ooz-zina* inherits only as a half brother by the mother, while the twin of an imprecated son inherits as a full brother.[1]

Among residuaries of different kinds, the nearest is preferred.

When there are several residuaries of different kinds, one a residuary in himself, another a residuary by another, and the third a residuary with another, preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first. Thus, when a man has died, leaving a daughter, a full sister, and the son of a half brother by the father, a half of the inheritance is to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's son. So, also, when there is with the brother's son a paternal uncle, there is nothing to the uncle. And in like manner when in the place of the bother's son there is a half brother by the father, there is nothing for the half brother.[2]

Residuaries for special cause.

The residuaries for special cause are the emancipator, and then his residuaries in the same way as has been already mentioned.

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1 A man may deny one of twins and acknowledge the other, but in that case the paternity of both is established (*Hidayah*, Vol. II, p. 325); so that each is full brother or sister to the other.

2 Because strength of propinquity, or being the master of two propinquities, is preferred to being master of one.—*M. L. I.*, 2nd Ed., p. 57.

Of Distant Kindred.*

The distant kindred are all relatives who are neither sharers nor residuaries, and they are like the residuaries insomuch that when there is only one of them he takes the whole property. Of the distant kindred there are four classes. The first comprises the children of daughters and sons' daughters; the second are the false grandfathers and false grandmothers; the third are the daughters of full brothers and of half brothers by the father, the children of half brothers by the mother, and the children of all sisters; the fourth are the paternal uncles by the mother (that is, the half brothers of the father by the same mother) and their children, paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full paternal uncles and half paternal uncles by the father. These, and all that are connected with the deceased through them, are his distant kindred.

Definition.

Four classes.

The first class of the distant kindred is first in the succession, though the individual claimant should be more remote than one of another class. The second is next; then the third; then the fourth; according to the order of the residuaries. And this has been adopted. Neysabooree has stated in his Book on Inheritance, that none of the second class can inherit, though nearer to the deceased, while there is one of the first, though more remote; and in like manner as to the third with the second, and the fourth with the third. And he has said that this has been approved of for the *futwa*, and acted upon by 'our' sheikhs, who give precedence absolutely to the first class over the second, the second over the third, and the third over the fourth. So that the daughter of a daughter, how low soever, is preferred to the mother's father.

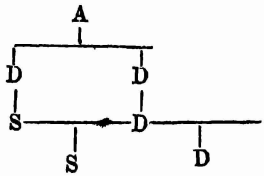
Order of succession.

* Baillie's Digest of Muhammadan Law, pp. 715-717.

Rules of preference among the individuals of each class.

The preference of individuals in the different classes is regulated by the following rules :—1st. The nearer to the deceased is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of a daughter's daughter, and a maternal grandfather is preferred to the father of a mother's mother. 2nd. When there is an equality in degree, that is, in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter. But this rule is not applicable to the second class, though it applies to all the rest. 3rd. If the claimants are equal in proximity to the deceased, and there is no child of an heir among them, the property is to be equally divided among them, if they are all males or all females ; and if there is a mixture of males and females, then on the proportion of two parts for a male and one to a female. This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. But when the ancestors are of different sexes, though, according to Aboo Yoosuf, the division is to be made in the same way, yet, according to Muhammad, it is only the number that is to be taken from the individual claimants and the quality of sex is to be taken from the generation in which the difference of sex first appears. Thus, if one should leave the son of a daughter and the daughter of a daughter, the property is to be divided among them in the proportion of two shares to the male and one to the female, because here the sex of the ancestors is the same : but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided between them in halves, according to Aboo Yoosuf, regard being had merely to the number of the individuals ; while, according

to Muhammad, the property is to be divided between them in thirds, two-thirds to the daughter of the son of a daughter, and one-third to the daughter of the daughter's daughter. The Imam Asbeejanee has given the preference to the opinion of Aboo Yoosuf, as being of easier application, and the author of the Moheet and the sheikhs of Bookhara have also adopted it in this class of cases. 4th. If one of the claimants is connected with the deceased in two or more ways, he will inherit by each way, regard being had to the branches, according to Aboo Yoosuf, and to the roots according to Muhammad; except the grandmother, who, according to Aboo Yoosuf, can inherit only in one way. Thus, suppose a man to have left two daughters who have died, one leaving a son and the other a daughter; and suppose this son and daughter to intermarry, and to have a son, after which the daughter marries another man, to whom she bears a daughter,—her first child is thus the son of a daughter's son and also the son of a daughter's daughter, while her second child is only the daughter of a daughter's daughter according to the scheme in the margin. Now suppose the husband and wife and the grandmothers to be dead, and the question to relate to the estate of the great-grandfather:



according to Aboo Yoosuf, the son would take four-fifths and the daughter one-fifth, that is, a double share as a male, and that doubled by reason of his being connected in two ways. While, according to Muhammad, the son would take five-sixths, and the daughter only one-sixth; that is, Muhammad would make the division according to sexes in the second generation, where the distinction first appears, giving two-thirds or four-sixths to the grandson

which would pass wholly to his son, and leaving the remaining third or two-sixths for the granddaughter, which would be equally divided between her son by the first marriage, and her daughter by the second.[1]

'HUJUB' OR EXCLUSION.

(*Baillie's Digest of Muhammadan Law, pp.* 705-6.)

Exclusion: Partial, Total.

EXCLUSION is of two kinds—partial and total; and partial exclusion is a reduction from one share to another. As regards total execlusion, there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, the wife.[2] As regards all others besides these, the nearer excludes the more remote;[3] and persons who are related through others do not inherit with them, except only the children of the mother, that is, half brothers or sisters on her side, who are not excluded by her.

One incapable of inheriting has no effect in excluding others

One who is deprived of any interest in the estate, that is, one incapable of inheriting, as an infidel, a homicide, or a slave, has no effect in excluding others, either partially or totally. But one who is only excluded may exclude others, by general agreement; as, for instance, two or more brothers or sisters, full or half, and on whatever side, who do not inherit when there is a father, but reduce a mother's share from a third to a sixth.

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1 For further details regarding the distant kindred, the reader is referred to the *M. L I.*, Chap. XI, 2nd edition, Chap. XII.

2 In the *M. L. I.*, p. 58, the son is omitted by mistake. Rectified in the 2nd Ed., p. 53.

3 This is true absolutely, as between residuaries. But a nearer residuary does not always exclude a more remote sharer ; as for instance, a mother's mother is not excluded by a father : and a nearer sharer does not exclude a more remote residuary, nor even a more remote sharer, unless there is one cause of succession, as in the case of a mother and grandmother, or a daughter and daughters of a son.—*Shureefeea*, p. 62.

Examples of exclusion.

Full brothers and sisters are excluded by a son, son's son, and a father, and by a grandfather also, with some difference of opinion. Half brothers and sisters on the father's side are excluded by the same persons, and also by full brothers and sisters; and half brothers and sisters on the mother's side are excluded by a child, the child of a son, a father, and a grandfather, by general agreement.[1] All grandmothers, whether maternal or paternal, are excluded by a mother; and paternal grandmothers are excluded by a father, as a grandfather is excluded by him, and they are also excluded by a grandfather when anterior to him; but a paternal grandmother is not excluded by a grandfather, because she is not anterior to him. Grandmothers on the side of the mother are not excluded by a father; so that is one should leave a father, a father's mother, and a mother' mother, the father's mother is excluded by the father; but there are different opinions as to the mother's mother, some saying that she has a sixth, and others, only the half of a sixth. The nearer excludes the more remote, whether himself an heir or excluded. Thus, if one should leave a father, a father's mother, and the mother of a mother's mother, it is said that the father has the whole, because he excludes his mother, and she excludes the mother of the mother's mother, because she is nearer to the deceased. There is a difference of opinion as to her succeeding with her son, who is paternal uncle to the deceased; but according to the generality of 'our sheikhs,' she does inherit with her son who is the paternal uncle.

Only one maternal grandmother who can be an heir.

It should be remembered that only one grandmother on the side of a mother can be considered an heir, for true grandmothers are only those in whose line of relationship

1 *By general agreement* means according to the general opinion.

a father does not come between two mothers; so that this single heir is the mother's mother how high soever, and the nearer excludes the more remote, so that only one grandmother can inherit. But of the paternal grandmothers it may be conceived that many may be heirs.

ON APOSTACY—IMPEDIMENTS TO SUCCESSION, AND—EXCLUSION FROM INHERITANCE.

(*Sircar's Muhammadan Law, Part I, pp.* 271—284.)

Apostate defined.

THE lexicographical meaning of the '*Murtadd*' (rendered by 'apostate') is one who turns away (from an object); but in law it signifies 'a renouncer of the Muhammadan faith.' The essentiality of apostacy consists in the uttering of words against the (Muhammadan) religion, after embracing the (Muhammadan) faith, which is belief in Muhammad with respect to all that came down to him from Almighty God.—Durr-ul-Mukhtár, page 392.

Principle.

CLXI. When a male apostate has died (naturally,) or been killed, or passed into a hostile country (dár-ul-harb), and the Judge (Kází) has determined his having gone into the hostile country, then what he had acquired at the time

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clxi When a male apostate is put to death, or dies naturally, or escapes to a foreign country, all that he had acquired while a Musalmán belongs to his heirs.[1]—Fatáwá Alamgírí, Vol. VI, page 633 — *Vide* B. Dig., page 700.

If he (the apostate) die, or be killed while an apostate, or be determined (by the Kází) to have gone into a hostile country, then his Musalmán heir, even though such heir be a wife, who has observed the

1 By Act XXI of 1850 of the Indian Legislature, it is declared, that—"So much of any law or usage as inflicts on any person forfeiture of right or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from

of his being a Musalmán goes to his heirs who are Musalmáns (*a*), but what he has earned since the time of his apostacy, is placed in the Public Treasury (Bayit-ul-mál,) according to Abú Hanífah.—Sirájiyyah, page 58.

But according to the two lawyers (Abú Yusuf and Muhammad), both the acquisitions go to his Musalmán heir or heirs.—*Ibid.*, page 58.

(*a*) Among these the wife is included, if she is a Musalmán, and her *iddat* is unexpired at the time of his death. But if her *iddat* has expired, or if her marriage was never consummated, she has no right to any share in Explanation.

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abstinence (*iddat*), will inherit what was acquired by him (the apostate) at the time of his having been a Musalmán, after payment, however, of the debts incurred by him while a Musálmán; but what was acquired by him during apostacy, will be (taken as) a spoil after payment of the debts which he had contracted while an apostate. The two lawyers, (Abú Yusuf and Muhammad), say, that the property acquired during apostacy is also an inheritance.—Durr-ul-Mukhtár, page 392.

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the communion of any religion, or being deprived of caste, shall cease to be enforced as law in all the courts of this country." This removes the disqualifications of the apostate himself; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Musalmán relatives by the mere difference of religion—an objection that is left untouched by the Act; while apparently, there would be no objection to the relatives inheriting from the apostate or his children, for being no longer of the Musalmán religion, his or their succession could hardly be regulated by Muhammadan law.—Note by Mr. Neil Baillie.

In Syed Ziya-ood-deen *v* Sheikh Lootf Alee, it has been actually determined by the late Sudder Dewanny Adawlut, that 'if by Muhammadan law a Sunní could not inherit from a Shiáh, (a Sunní's becoming a Shiáh and *vice-versâ* being according to that law *quasi*-apostacy), then under the provisions of Act XXI of 1850 (the clear purport whereof is, that religious exclusion shall not be permitted to check the ordinary current of the civil law of inhertance, and any law previously in force, which should be taken to interrupt the law of inheritance upon the ground of a change of religious faith, shall not at all be enforced) this rule of Muhammadan law cannot be enforced, so as to impair the right of inheritance.—Sudder Dewanny Adawlut, Dec. for 1856, page 1092.

his inheritance. She also loses her right if she apostatizes with him; though when a husband and wife apostatize together, her marriage still continues. If she should bear a child after their apostacy, and the husband should then die, the child would be entitled to a share in his inheritance, if the birth takes place within six months from the day of the husband's apostacy; but if the birth should take place at more than six months from the day of the apostacy, the child would have no right.—Fatáwá Alamgírí, Vol. VI, page 633.—B. Dig., p. 700.

According to Sháfií, however, both the acquisitions must be entirely placed in the public treasury.—Sirájiyyah, p. 58.

Principle. CLXII. If, however, he again become a Musalmán previously to the (Kází's) determination, then he will be treated as if he did not become an apostate; and if he returned to the Muhammadan faith after that (determination), when his property has been already with his heirs, then he will retake it either amicably or by lawsuit; but he shall not take the property if it has been placed in the public treasury, by reason of its having (already) become a spoil. And if the property has been destroyed, or the heir (or successor) has alienated it relinquishing his own right, then he (the former) shall not have it, even though the property be in existence, because the judgment (of the Kází) is irrevocable.—Durr-ul-Mukhtár, page 392.

The same author moreover says:—"An apostate's right to his estate is forfeited by way of suspense: afterwards, if he return to the Muhammadan faith, the estate will revert to him."—*Ibid.*

Principle. CLXIII. What he gained after his arrival in the hostile country, is confiscated by general consent;[1] because it was gained by him while he was a resident in a hostile country,

1 Sirájiyyah, page 58.

and a Musalmán does not inherit from a resident of a hostile country.[1]

CLXIV. All the property of a female apostate (whether it be acquired by her while she was a Musalmán, or during her apostacy, but previous to her going to a hostile country[2]) goes to her Musalmán heirs, without diversity of opinion.—Sirájiyyah, page 58. Principle.

"Because," says Sharíf, "according to our doctrine, a female apostate is never killed, but is imprisoned until she becomes a Musalmán, or departs this life."—Sharífiyyah, page 148.

As regards the succession of apostates themselves,—

CLXV. A male apostate does not inherit from any one, neither from a Musalmán, nor from an apostate like himself (*c*);—so also a female apostate shall not inherit from any one, except when the people of a whole district become apostates altogether; for then they inherit reciprocally (*d*). —Sirájiyyah, page 58. Principle.

(*c*) Inasmuch as an apostate has, by his apostacy, become a sinner, and therefore, he is not entitled to any favours

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clxiv. When a female apostate dies, the right of her husband to take a share in her inheritance depends on the fact of her having apostatized during health, or during sickness. If the apostacy took place when she was in health, he has no right to any thing. If it took place when she was sick, and she has died when her *iddat* was still unexpired, though by analogy she was no evader, and he could, therefore, have no right to her inheritance, yet on a liberal construction she is accounted to be such, and he is allowed to participate.—Fatáwá Alamgírí, vol. vi, page 633—B. Dig., page 701.

clxv. A female apostate, like a male apostate, cannot inherit from any one, because she has no religion.—*Ibid.*

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1 Sharífiyyah, page 148.

2 Sharífiyyah, page 58.

of the law, that is, to inheritance; on the contrary, he deserves to be excluded with punishment, just as a murderer forfeits his right.—Sharífiyyah, page 148.

(*d*) Because (then) their district becomes a hostile country by reason of the rules of infidels being promulgated therein.—Sharífiyyah, page 149.

Principle. CLXVI. If a person before his becoming an apostate was entitled to the inheritance of a relative, his subsequent apostacy does not deprive him of his right of succession to the same; though upon his becoming an apostate he would forfeit his right to hold the property so inherited, and the same would be taken by *his* Musalmán heir or heirs.

Precedent. *Vide* Wujih-un-nessá Kháuam *v.* Mirzá Hosain Alí.—Sel. Sudder Dewanny Adawlut Reports, vol. i, page 268, (New Ed., p. 356).

Impediments to succession. *Impediments to succession are (principally) four (viz.,)* 1—*Slavery,* 2—*Homicide,* 3—*Difference of religion,* and 4—*Difference of country.*

Principle. CLXVII. Slavery, whether it be perfect (*e*) or imperfect (*f*), is an impediment to succession.[1]

(*e*) Perfect.] As the condition of an absolute slave (*kinn*), since an absolute slave is not master of any property, though he may have all the means of possessing property; he, therefore, is not entitled to inheritance.—*Vide* Sharífiyyah, page 11.

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clxvii. Slavery is an impediment to inheritance, and in this respect there is no difference between an absolute and a qualified slave. Even a partially emancipated slave is not capable of inheriting according to Abú Hanífah.—Fatáwá Alamgíri, vol. vi, page 631.—B. Dig, p. 697.

Slavery, though imperfect, as (the condition of) a Mukátab[1] slave, (is an impediment to succession).—Durr-ul-Mukhtár, page 862.

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1 *Vide* Surájiyyah, page 5.

Two daughters succeed, excluding their mother, who is a slave of the deceased proprietor.—Macnaghten's Precedents of Muhammadan Law, Chap. I, Case lxxii. Precedent.

(*f*) Imperfect.] As the condition of a Mukátab,[1] Mudabbar,[2] or Umm-ul-walad.[3]—Sharífiyyah, page 11. Explanation.

CLXVIII. Homicide, whether punishable by retaliation (*g*), or expiable (*h*), is an impediment to the slayer's inheriting from the person slain by him.[4] Principle.

(*g*) 'Homicide punishable by retaliation' is wilful murder. When a person intentionally strikes a blow on a person with a weapon, or with a thing which equally with it may serve to sever a limb or limbs (from one's body), such as a sharp piece of wood or a stone, its result is crime and retaliation, and there is no expiation for the same.—Sharífiyyah, page 11. Explanation.

Every act of malice that induces retaliation or expiation is a cause for depriving (the slayer) of a right of inheritance to the person slain.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

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1 The slave who ransoms himself is denominated a Mukátab (written off).

2 A Mudabbar slave is he who is promised by his master to be free after his death.

3 An Umm-ul-walad (child's mother) is a female slave who has borne a child or children to her master, and is thence entitled to be free after his death.—See Hidáyah, vol. i, pages 475, 479, and vol ii, page 98.

Slavery by the Muhammadan Law is either perfect and absolute, as when the slave and all that he can possess are wholly at the disposal of his master; or imperfect and privileged, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a female slave, who has borne a child to her master, is also privileged; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The Arabian custom of allowing a slave to cultivate a piece of land, or set up a trade on his own account, so that he may work out his manumission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their proprietors.—Note by Sir W. Jones, page 60.

4 *Vide* Sirájiyyah, page 5.

Explanation. (*h*) 'Homicide expiable' is manslaughter, as striking a person with a thing which generally does not kill; and the result thereof, according to both doctrines,[1] is the payment of expiatory mulct by the relations (of the criminal), and also sin and atonement, there being no retaliation for it;—or it is an accidental death.—Sharífiyyah, page 12.

Example. As where a man shot an arrow at his prey, and the arrow by accident killed a human being; or where a person, while asleep, turned upon another, and (thereby) killed him; or where a beast of burthen trampled upon (a person) while a man was riding upon it; or where one fell from the roof of a house upon a person (who was thereby killed); or where a piece of stone fell from one's head upon a person and he (the latter) died. The result of these is atonement, and payment of expiatory mulct, but no sin: in all of these (or such) cases, the killer would be excluded from the inheritance (of the killed), provided such killing be not a justifiable homicide.—Sharífiyyah, page 12.

Principle. CLXIX. There is (however) one instance of intentional homicide, where the crime induces the incapacity of inheriting, though the offender is not subject to retaliation. This is the case of a son murdered by his father. But it is properly an exception to the law of retaliation, the crime having been originally subject to this highest penalty, and remitted by the Prophet.[2]

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clxix. Homicide, whether it is punishable by retaliation, or expiable, (disables the perpetrator to inherit from the slain), even though the crime be pardonable, as in the instance of a father killing his son.—Durr-ul-Mukhtár, page 862.

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1 That is, according to the opinions of both Abú Hanífah and Sháfí.

2 B. M. L., page 24.

"Should you, however, allege," says Sharíf, "that if a father intentionally kills his son, and although no retaliation or atonement is ordained (for it), yet, according to all doctrines, he is excluded (from inheritance)." "To this," says Sharíf, "I would reply, that the killing in question was originally the cause of retaliation, but it has been remitted by (this) dictum of the Prophet: 'A father shall not suffer capital punishment for (killing) his son; nor a master for his slave.' It should not be objected that, according to the (general) dictum of the Prophet, 'a slayer is excluded from the inheritance of the slain;' the slayers should, without exception, be excluded from inheritance, as is held by Sháfií. For, how then can all those cases be excepted? We maintain that the slayer for a just cause is excepted, because exclusion is ordained as a punishment for the prohibited description of killing: but as to the exclusion of the creator of a cause of killing, he is not in fact a killer."—Sharífiyyah, page 12.

Hence, where the crime is a justifiable one, there is no exclusion. Thus,—

CLXX. If a person kills his ancestor or predecessor for retaliation, or by inflicting chastisement under the sentence of a Kází (Judge), or for self-defence, in such case the killer would not at all be excluded (from the inheritance of the killed). The same is the law where a just (or loyal) person killed his ancestor who was a rebel.—Sharífiyyah, p. 12. Principle.

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One who has unlawfully killed another is incapable of inheriting from him, whether the killing was intentional or a misadventure, as by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer was riding.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

Principle. CLXXI. And if the killing be not directly, but by creating a cause, or (in other words) by merely being the occasion of the death, as by digging a pit or well in another's property or land (into which one falls and dies), or by placing upon it a large stone, (against which one stumbles, and death is the consequence), then the expiatory mulct or the price of blood must be paid for the killer by his relations, but neither retaliation nor atonement is ordained therein. Such is also the case if the killer be an infant, or a mad person. In such cases of homicide, there is no exclusion from inheritance.[1]—Sharífiyyah, page 12.

ANNOTATIONS.

clxxi. But being the indirect cause of a person's death is not a sufficient ground for excluding from inheritance; as, for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles, and is killed in consequence.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

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1 Homicide is either with malice, prepense, and punishable with death; or without proof of malice, and expiable by redeeming a Musalmán slave, or by fasting two entire months, and by paying the price of blood; or thirdly, it is accidental, for which an expiation is necessary. Malicious homicide or murder (for, by the best opinions, the Arabian law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous instrument likely to occasion death, as with a sharp stick or a large stone, or with fire, which has the effect, says Kásim, of the most dangerous instrument, and, by parity of reason, with poison or by drowning; but those two modes of killing are not specified by him; and there is a strange diversity of opinion concerning them. Killing without proof of malice is, when death ensues from a beating or blow with a slight wand, a thin whip, or a small pebble, or with anything not ordinarily dangerous.—Note by Sir W. Jones, page 61.

If, however, a man were to dig a pit, or fix a large stone on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary occasion (but not the cause) of the death, must pay the price of blood; but would not, it seems, be generally disabled from inheriting; he ought, one would think, to be incapable of succeeding to the property of the deceased, whom he destroyed, and whom he might have meant to destroy, by such a machination.—*Ibid.*, page 62.

CLXXII. When a father has circumcised his child, and the child died in consequence of the operation, the father is not deprived of his right in the child's inheritance.[1]—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

According to Shafií, however, the killer of a person does not at all inherit.—Durr-ul-Mukhtár, page 862.

CLXXIII. Difference of religion—that is, difference between Islam and infidelity—is an impediment to succession. (*i*)[2] Principle.

(*i*) Thus an infidel shall not inherit from a Musalmán agreeably to the doctrine of all, and a Musalmán shall not inherit from an infidel according to the dictum of Alí, Zayid, and the whole of the Prophet's Companions. This doctrine is followed by our learned legislators, and also by Sháfií, in accordance with this dictum of the Prophet: "The followers of two different religions shall not inherit from each other."—Sharífiyyah, page 13. Example.

ANNOTATIONS.

clxxiii. Difference of religion (between) Musalmáns and infidels (is an impediment to succession).—Durr-ul-Mukhtár, page 862.

clxxiii. Difference of religion is also an impediment to succession, by which it is meant, the difference between Islam and infidelity.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 798.

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1 But if he should admonish him with stripes, and the child should die in consequence, he is responsible for the díyat or fine, and loses his right to inherit according to Abú Hanífah, though he is not responsible according to the other two (Abú Yusuf and Muhammad), and if a teacher be the person who punished the child, with the father's permission, he does not incur any liability, according to all their opinions.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

2 *Vide* Sirájiyyah, page 5.

Difference of religion is such an impediment to inheritance, that an infidel cannot, in any case, be an heir to a believer, nor a believer to an infidel.—B. M. L., page 24.

Principle. CLXXIV. The free thinkers (Ahl-ul-hawá) are not, however, excluded from succeeding to orthodox Muhammadans, since they are believers of the Prophets and the scriptures, but differ only in their interpretation of the latter and Sunnat.—Sharífiyyah, page 14.

But a difference of faith among unbelievers, such as Christianity, Judaism, Mujoosseeism, and idolatry, is no impediment of succession, so that there are mutual rights between Christians, Jews, and Mujoossees.[1]—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.—*Vide* Sharífiyyah, page 14.

All infidels, however different their creeds may happen to be, inherit from each other, since they are considered as being of one religion.[1]—Sharífiyyah, page 13.

Principle. CLXXV. Difference of country,—either actual, as between an alien enemy and an alien tributary(*a*), or qualified, as between a fugitive (mustámin) and a tributary (Zimmí), or between two fugitive enemies from two different states (*b*),—is also an impediment to succession.

ANNOTATIONS.

clxxv. Difference of country (*dár*) is also an impediment to succession, but this applies only to unbelievers, not to Musalmáns. So that if a Musalmán should die in a hostile country (dár-ul-harb), his son in the country of peace (dár-ul-Islám) inherits from him. The difference of country is actual when an alien dies in the dár-ul-harb, having a father or son who is a tributary infidel (Zimmí) in the dár-ul-Islám; and in that case, the Zimmí does not inherit from the alien. In like manner, if a Zimmí should die in the dár-ul-Islám, leaving a father or son in the dár-ul-harb, he would not inherit from him.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.

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1 An unbeliever shall never be heir to a believer, and conversely; but infidel subjects may inherit from infidels.—Note by Sir William Jones.

Because when an alien enemy enters (*i. e.*, takes his domicile in) the country of Musalmáns, obtaining protection (by payment of the tribute exacted from infidels), then he and the alien tributary, though actually in one country, are in a qualified sense in two different countries, inasmuch as the fugitive is in the qualified sense in the seat of hostility. Do you not see that he may return to it, and there is no probability of his living perpetually in our country, whereas the case is otherwise with the alien tributary. Consequently, they do not inherit from each other.—Sharífiyyah, page 14. Reason.

(*a*) Thus if an alien enemy die in the abode or seat of hostility (dar-ul-harb,) leaving a father and son who are alien tributaries in the abode or seat of peace (dar-ul-Islám), or if an alien tributary die in the seat of peace, leaving a father and son in the seat of hostility, then none of them shall inherit from the other; because the alien tributary being in the seat of peace, and the alien enemy in the seat of hostility, the relationship between them is cut off by the actual difference of country, although they were of the same religion; consequently the (right of) inheritance founded upon (such) relationship, is also cut off (or destroyed); inasmuch as the heir succeeds to the ancestor in his property by becoming the owner thereof and appropriating and enjoying the same.[1]—Sharífiyyah, page 14. Illustration.

(*b*) As regards the second example, (*viz.*, between two fugitive enemies from two different states), if it be supposed, as it is said, that they are two fugitive enemies in their own countries, which are different from each other then it should Illustration.

1 When an enemy dies in a hostile country, leaving within the Muhammadan territories a father or son who is a Zimmí, or a Zimmí dies in the Muhammadan territories, leaving a father or son who is an enemy and residing in a hostile country, neither can succeed to the other, though they should be of the same religion, because their countries are actually different, the Zimmí being to all intents and purposes a subject of the Muhammadan state.—B. M. L., page 29.

be held that they are in a manner actually in two different countries, (in which instance, this case should have been put before the case in the qualified sense), but if it be supposed that the two fugitives are actually in two different countries, but they are (living) in the seat of peace by obtaining protection, then they are actually in one country, and in the qualified sense in two different countries;[1] consequently, what is above said does not apply.—Sharífiyyah, pages 14 and 15.

"When a *Mustámin* dies in our territory, leaving property, it should be sent to his heirs; when a Zimmí dies without heirs, his property goes to the public treasury (bayit-ul-mál)."—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.

Principle. CLXXVI. A State differs from another by having different forces and Sovereigns, and there being no community of protection between them(*g*).[2]

ANNOTATIONS.

clxxvi. Countries differ by a difference of armies and Governments which cuts of protection between them.—Fatáwá Alamgirí, vol. vi, page 631.—B. Dig., page 698.

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1 The case is so far different with respect to a Zimmí and a Mustámin, that for the time they are both inhabitants of the same country; but their condition is not the same, the Zimmí being, as already observed, the subject of the Muhammadan state, to which he pays tribute and owes allegiance, and being no longer at liberty to return to the place of his birth. The Mustámin, on the other hand, is only on sufferance in the Muhammadan territory, where he is not permitted to remain longer than a year, and during that time he neither pays tribute, nor is debarred from returning to the country from whence he came, and to which he is held to belong It is not to be wondered at, therefore, that the Zimmí and Mustámin should be accounted in law as of different countries and consequently incapable of inheriting the one to the other.—B M. L., page 29.

2 The difference between two States or Countries consists in the difference of Sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them. This difference is particularly marked between a country governed by a Muhammadan power and a country ruled by a prince of any other religion; for they are always, virtually at least in a state of warfare, the first being called by lawyers the

(*g*) As, for instance, if one of the two Sovereigns is in India possessing a State and forces, and the other is in Turkey possessing a different State and forces, and the community of protection is cut off between them, so much so that each of them considers it lawful to kill the other; Example.

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seat of peace, and the second, the seat of hostility. A difference of country, therefore, which excludes from the right of inheriting, is either actual and unqualified, as when an alien enemy resides in the seat of hostility, or when an alien has chosen his domicile in the seat of peace, and pays the tribute exacted from infidels, in which case the tributary shall not be heir to the alien enemy dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is qualified, as when a fugitive enemy seeks quarter, and obtains a temporary residence in the seat of peace or when two alien enemies are fugitive from two different hostile countries: now although the tributary and the fugitive actually live in the same kingdom, yet, since the fugitive continues a subject of the hostile power, he remains as it were under a different Government, and there is no mutual right of succession between him and the tributary; nor by similarity of reasons between two fugitives, who leave two distinct hostile governments, and obtain quarter for for a time in the land of believers, but without any intention of making it their constant abode.—Note by Sir W. Jones, page 62.

Mr. Neil Baillie observes as follows:—

"Countries differ from each other by having different Sovereigns and armies; but Muhammadans, though no longer subject to the sway of one prince, are still accounted of the same country being connected together by the tie of their common religion. Difference of country is consequently no impediment to inheritance, so far as they are concerned. It is also liable to some modification with respect to unbelievers. In the early ages of the Muhammadan religion, all who were not for it, were considered to be against it, and every infidel was an enemy, on whom it was the sacred duty of the true believer to wage war until he embraced the faith or consented to pay tribute. In later times, some practical relaxation of this doctrine became necessary; and we accordingly find the Turks and some other Muhammadan nations entering into treaties of peace, and even offensive and defensive alliances, with people of a different faith. Difference of country is no impediment to inheritance, between the subjects of kingdoms between which there subsist engagements for mutual assistance against enemies; and a simple treaty of peace would probably have the same effect, though the authorities are not express upon this point. The reason assigned by the author of the Sirájiyyah, for the difference of country being a bar to inheritance, is the want of mutual protection to the subjects of different States; and it is applicable only to a State of actual warfare, which was probably the condition of the whole world, so far as the author was acquainted with it, at the time that he wrote. The comment on the text also implies a state of hostilities; for it supposes by way of illustration, that if a soldier of one of the States fall in the way of the troops of the other, they may lawfully put him to death. It seems therefore probable that in the present age of the world, the subjects of different countries may lawfully inherit to each other, if there be no other legal impediment, unless their governments be positively opposed in actual warfare." B. M. L., pp. 30, 31.

and if a man belonging to the army of one of them, finding a man belonging to the army of the other, kills him, then, such two countries are different, and by reason of those being different there shall be exclusion from inheritance, since it (the inheritance) was (allowed) upon the basis of the community of protection and relation. But if there is (between them) alliance and community of assistance against their enemy, then they are (as it were) one State, and there shall be no exclusion from inheritance.—Sharífiyyah, page 15.

To the foregoing principles may be added the following, laid down by the British courts of justice in India, and based upon the Fatwás, or law opinions, given by their Muhammadan Law Officers.

1. Suspicion of murder, not fully proved, is no impediment to succession.

Vide Macnaghten's Precedents of Muhammadan Law, Chap. I, Case 7.

2. Presumptive proof of homicide does invalidate one's claim on the ground of gift.

3. One cannot inherit the estate of a deceased proprietor upon the allegation or admission that the deceased was his relative, if he (the claimant) has already denied his having been so, the repugnancy (tanákuz) of one assertion to the other being an impediment to his succession.

Sháh Abadee *v.* Sháh Alí Nukkee.—Sel. S. D. A. Rep., vol. i, p. 73. (New Ed., p. 97).

4. Renunciation in the lifetime of an ancestor is no impediment to the claim of succession after that ancestor's death.

Vide Macnaghten's Precedents of Muhammadan Law, Chap. I, Case 11.

5. Insanity and blindness do not disqualify from inheriting.—*Vide Ibid.*, Case 10.

TABLE OF SUCCESSION.

According to the Sunni School.

By the Hon'ble C. D. Field, M. A., Ll. D.,
Barrister-at-Law, and Judge, Calcutta High Court.

I.—Sharers.

* 1° Father. (A)—As mere *sharer*, when a son or son's son, how low soever, he takes $\frac{1}{6}$. (*B*)—As mere *residuary*, when no successor but himself he takes the whole: or with a sharer, not a child or son's child, how low soever, he takes what is left by such sharer. (*C*)—As sharer and residuary, as when there are daughters and son's daughter, but no son or son's son, he, as sharer, takes $\frac{1}{6}$; daughter takes $\frac{1}{2}$, or two or more daughters $\frac{2}{3}$; son's daughter $\frac{1}{6}$; and father the remainder as residuary.

† 2° True Grandfather, *i. e.*, father's father, his father and so forth, into whose line of relationship to deceased no mother enters, is excluded by father and excludes brothers and sisters; comes into father's place when no father, but does not like father reduce mother's share to $\frac{1}{3}$ of residue, nor entirely exclude paternal grandmother.

† 3° Half Brothers by same Mother, take, in the absence of children, or son's descendants, and father and true grandfather, one $\frac{1}{6}$, two or more between them $\frac{1}{3}$. R.

* 4° Daughters; when no sons, take, one $\frac{1}{2}$; two or more, $\frac{2}{3}$ between them: with sons become residuaries and take each half a son's share. R

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* Are always entitled to some shares.
† Are liable to exclusion by others who are nearer.
R Denotes those who benefit by the Return.

† 5° Son's Daughters; take as daughters, when there is no child; take nothing when there is a son or more daughters than one; take $\frac{1}{6}$ when only one daughter; are made residuaries by brother or male cousin, how low soever. R

* 6° Mother: takes $\frac{1}{6}$, when there is a child or son's child, how low soever, or two or more brothers or sisters of whole or half blood; takes $\frac{1}{3}$, when none of these: when husband or wife and both parents, takes $\frac{1}{3}$ of remainder after deducting their shares, the residue going to father: if no father, but grandfather, takes $\frac{1}{3}$ of the whole. R

† 7° True Grandmother, *i. e.*, father's or mother's mother, how high soever; when no mother, takes $\frac{1}{6}$: if more than one, $\frac{1}{6}$ between them. Paternal grandmother is excluded by both father and mother; maternal grandmother by mother only. R

† 8° Full Sisters, take as daughters, when no children, son's children, how low soever, father, true grandfather or full brother: with full brother, take half share of male: when daughters or son's daughters, how low soever, but neither sons, nor son's sons, nor father, nor true grandfather, nor brothers, the full sisters take as residuaries what remains after daughter or son's daughter have had their share. R

† 9° Half Sisters by same Father: as full sisters, when there are none: with one full sister, take $\frac{1}{6}$; when two full sisters, take nothing, unless they have a brother who makes them residuaries, and then they take half a male's share. R

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* Are always entitled to some shares.
† Are liable to exclusion by others who are nearer.
R Denotes those who benefit by the Return.

† 10° HALF SISTERS BY MOTHER ONLY: when no children or son's children, how low soever, or father or true grandfather, take, one $\frac{1}{6}$; two or more $\frac{1}{3}$ between them. R

* 11° HUSBAND: if no child or son's child, how low soever, takes $\frac{1}{2}$: otherwise, $\frac{1}{4}$.

* 12° WIFE: if no child or son's child, how low soever, takes $\frac{1}{4}$: if otherwise, $\frac{1}{8}$. Several widows share equally.

COROLLARY.—*All* brothers and sisters are excluded by son, son's son, how low soever, father or true grandfather. Half brothers and sisters, on father's side, are excluded by these and also by full brother. Half brothers and sisters on mother's side are excluded by *any* child or son's child, by father and true grandfather.

II.—Residuaries.

A.—RESIDUARIES IN THEIR OWN RIGHT, being *males* into whose line of relationship to the deceased no *female* enters.

(a).—Descendants.

1. Son.
2. Son's son.
3. Son's son's son.
4. Son of No. 3.
   - 4A. Son of No. 4.
   - 4B. And so on, how low soever.

(b).—Ascendants.

5. Father.
6. Father's father.
7. Father of No. 6.

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* Are always entitled to some shares.
† Are liable to exclusion by others who are nearer.
R Denotes those who benefit by the Return.

8. Father of No. 7.
   8A. Father of No. 8
   8B. And so on, how high soever.

(c).—Collaterals.

9. Full brother.
10. Half brother by father.
11. Son of No. 9.
12. Son of No. 10.
   12A. Son of No. 11.
   12B. Son of No. 12.
   12C. Son of No. 12A.
   12D. Son of No. 12B.
   And so on, how low soever.
13. Full paternal uncle by father.
14. Half paternal uncle by father.
15. Son of No. 13.
16. Son of No. 14.
   16A. Son of No. 15.
   16B. Son of No. 16.
   And so on, how low soever.
17. Father's full paternal uncle by father's side.
18. Father's half paternal uncle by father's side.
19. Son of No. 17.
20. Son of No. 18.
   20A. Son of No. 19.
   20B. Son of No. 20.
   And so on, how low soever.
21. Grandfather's full paternal uncle by father's side.
22. Grandfather's half paternal uncle by father's side.
23. Son of No. 21.
24. Son of No. 22.
   24A. Son of No. 23.
   24B. Son of No. 24.

And so on, how low soever.

N. B.—(*a*) A nearer residuary in the above Table is preferred to and excludes a more remote.

(*b*) Where several residuaries are in the same degree, they take *per capita*, not *per stirpes*, *i. e.*, they share equally.

(*c*) The whole blood is preferred to and excludes the half blood at each stage.

B.—Residuaries in another's right, being certain females, who are made residuaries by males parallel to them; but who, in the absence of such males, are only entitled to legal shares. These female residuaries take each half as much as the parallel male who makes them residuaries.

1. Daughter made residuary by son.
2. Son's daughter made residuary by son's son.
3. Full sister made residuary by full brother.
4. Half sister by father made residuary by *her* brother.

C.—Residuaries with another, being certain females who become residuaries with other females.

1. Full sisters with daughters or daughters' sons.
2. Half sisters by father.

N. B.—When there are several residuaries of different kinds or classes, *e. g.*, residuaries in their own right and residuaries with another, propinquity to deceased gives a preference: so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.

If there be residuaries and no sharers, the residuaries take all the property.

If there be sharers, and no residuaries, the sharers take all the property by the doctrine of the "Return." Seven persons are entitled to the Return. 1*st*, mother; 2*nd*, grand-

mother; *3rd*, daughter; *4th*, son's daughter; *5th*, full sister; *6th*, half sister by father; *7th*, half brother or sister by mother.

A posthumous child inherits. There is no presumption as to commorients, who are supposed to die at the same time, unless there be proof otherwise.

If there be neither sharers nor residuaries, the property will go to the following class (Distant Kindred).

III.—Distant Kindred.

Comprising all relatives, who are neither sharers nor residuaries.

CLASS 1.

Descendants; Children of daughters and son's daughters.

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter of No. 1.
5. Son of No. 2.
6. Daughter of No. 2, and so on, how low soever, and whether male or female.
7. Son's daughter's son.
8. Son's daughter's daughter.
9. Son of No. 7.
10. Daughter of No .7.
11. Son of No. 8.
12. Daughter of No. 8, and so on, how low soever, and whether male or female.

N. B. (a)—Distant kindred of the first class take according to proximity of degree; but, when equal in this respect, those who claim through an heir, *i. e.*, sharer or residuary, have a preference over those who claim through one not an heir.

(*b*)—When the sexes of their ancestors differ, distribution is made having regard to such difference of sex, *e. g.*, daughter of daughter's son gets a portion double that of son of daughter's daughter, and when the claimants are equal in degree, but different in sex, males take twice as much as females.

Class 2.

Ascendants; false grandfathers and false grandmothers.

13. Maternal grandfather.
14. Father of No. 13, father of No. 14, and so on, how high soever, (*i. e.*, all false grandfathers).
15. Maternal grandfather's mother.
16. Mother of No. 15, and so on, how high soever (*i. e.*, all false grandmothers).

N. B.—Rules (*a*) and (*b*), applicable to class 1, apply also to class 2. *Further* (*c*) when the sides of relation differ, the claimant by the *paternal* side gets twice as much as the claimant by the *maternal* side.

Class 3.

Parents' Descendants.

17. Full brother's daughter and her descendants.
18. Full sister's son.
19. „ „ daughters and their descendants, how low soever.
20. Daughter of half brother by father, and her descendants.
21. Son of half sister by father.
22. Daughter of half sister by father, and their descendants, how low soever.
23. Son of half brother by mother.
24. Daughter of half brother by mother and their descendants, how low soever.

25. Son of half sister by mother.
26. Daughter of half sister by mother, and their descendants, how low soever.

N. B.—Rules (*a*) and (*b*) applicable to class 1 apply also to class 3. *Further*, (*c*) when two claimants are equal in respect of proximity, one who claims through a residuary is preferred to one who cannot so claim.

CLASS 4.

Descendants of the two grandfathers and the two grandmothers.

27. Full paternal aunt and her descendants.*
28. Half paternal aunt and her descendants.*
29. Father's half brother by mother and his descendants.*
30. Father's half sister by mother and her descendants.*
31. Maternal uncle and his descendants.*
32. Maternal aunt and her descendants.*

N. B. (*a*)—The *sides* of relation being equal, uncles and aunts of the whole blood are preferred to those of the half, and those connected by same father only, whether males or females, are preferred to those connected by the same mother only. (*b*) Where sides of relation differ, the claimant by paternal relation gets twice as much as the claimant by maternal relation. (*c*) Where sides and strength of relation are equal, the male gets twice as much as the female.

GENERAL RULE.—Each of these classes excludes the next following class.

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IV.—SUCCESSOR BY CONTRACT OR MUTUAL FRIENDSHIP. V.—SUCCESSOR OF ACKNOWLEDGED KINDRED. VI.—UNIVERSAL LEGATEE. VII.—PUBLIC TREASURY.

* Male or female, and how low soever.

TABLE OF SHARERS AND SHARES.

(*Rumsey's Muhammadan Family Inheritance, pp.* 17—21.)

Husband	$\frac{1}{4}$	when there is a child or son's h. l. s. child.*
"	$\frac{1}{2}$	when not.
Father	$\frac{1}{6}$	
Tr. Grandfather h. h. s. ...	$\frac{1}{6}$	when not excluded.
U. Brother or Sister† ..	$\frac{1}{6}$	when only one, and no child, son's h. l. s. child, father, or Tr. grandfather.
" "	$\frac{1}{3}$	when two or more, and no child, &c.
Wife	$\frac{1}{8}$	when child or son's h. l. s. child.
"	$\frac{1}{4}$	when not.

* The existence of a daughter's child (or, *á fortiori*, a son's h. l. s. daughter's child) could not, of course, have any effect on the husband's share, as such a child is a d k.—Sir 29; 34; &c. It would not have seemed necessary to make this remark had not the contrary been erroneously stated in Tag. Lect, 1874 p. 182. The author of the lectures, in another place, states the doctrine correctly, though with some confusion of language—*Vide* Tag. Lect., 1873, 80. These remarks apply wherever the expression "son's h. l. s. child" is used in the table. With regard to this expression it must also be remarked that if the reader should consult the Shar., he must be on his guard against being misled by the words "male issue of a son," "issue of a deceased son," and the like, which are sometimes used (*e. g.*, Shar. 65, 1, 22; 66, ll. 3, 4; 68, ll. 4, 5), where "son's h. l. s. child," "son's h. l. s. issue," or some expression having the same meaning, ought, strictly speaking, to be used.

† We have placed U. brother and U. sister together, because they stand on precisely the same footing; thus affording an exception to the rule of a double share to the male, which occurs so frequently that it may be considered a general rule.—Sir., 4; 6. It will be observed that two or more relations of this kind, whether of the same or of different sexes, take $\frac{1}{3}$. This is sometimes spoken of as the "mother's portion," or "mother's allotment," for it is the share that she would primarily be entitled to. In like manner the remaining fraction, $\frac{2}{3}$, is spoken of as the "father's portion," or "father's allotment," for if he and the mother stood alone, he would take (partly as sharer and partly as residuary) all that remains after payment of the mother's share. It would naturally be expected from the above that the U. brothers and U. sisters would take nothing when there is a mother; but this is not so, as will be seen from the table of sharers.

Daughter	$\frac{1}{2}$	when only one and no son.
„	$\frac{2}{3}$	when two or more and no son.
Son's h. l. s. Daughter* ...	$\frac{1}{2}$	when only one and no child or equal or higher son's son.
„ „	$\frac{2}{3}$	when two or more, and no child or &c.
„ „	$\frac{1}{6}$†	when one daughter or higher son's daughter and no son or &c.
Mother	$\frac{1}{6}$	when child or son's h. l. s. child; or two or more brothers or sisters or C. or U. brothers or sisters.
„	$\frac{1}{3}$	when not.
Mother (but)	$\frac{1}{3}$	of remainder only after deducting wife's or husband's share, when a wife or husband and a father, (*secus*‡ if a Tr. grandfather instead of a father).

* "Son's daughter, or other female descendant h. l. s."—Sir. 3 ; 4. But this evidently means son's h. l. s daughter, since daughters' children, sons' daughters' children, &c., are in the first class of D. K.—Sir 29; 34, and *infra*, Chap V. See also, as to these relations, the case of *tashhid*, which clearly shows that they are all related through an unbroken male line ; Sir. 5 ; 8, 9, and *infra*, 38.

† The theory is this ; the daughter, or higher son's daughter, takes $\frac{1}{2}$ and leaves $\frac{1}{6}$ for the proposed son's daughter ; but if there be two or more daughters, or higher son's daughters, they take their $\frac{2}{3}$, and there is nothing left for the proposed son's daughter.

‡ But, in Abu Yusuf's opinion, the presence of a "grandfather" has the same effect as that of the father (Sir. 8 ; 11). Of course a true grandfather is meant, for a false grandfather is a d. k. (*infra*, Chap V,) and his presence could not, therefore under any circumstances, affect a sharer's interests.

Tr. Grandmother h. h. s.	...	$\frac{1}{6}$ when not excluded.
Sister	...	$\frac{1}{2}$ when only one, and no son, son's son h. l. s., father, (perhaps Tr. grandfather), daughter, son's daughter, or brother.
„	...	$\frac{2}{3}$ when two or more, and no son, &c.
C. Sister	..	$\frac{1}{2}$ when only one and no son, &c., C. brother, or sister.
„	...	$\frac{2}{3}$ when two or more, and no son, &c., C. brother, or sister.
„	...	$\frac{1}{6}$ when one sister, but no son, &c., or C. brother.
U. Sister	...	(*Vide supra*, U. brother or sister.)

EXAMPLES OF THE DIVISION OF PROPERTY AMONG SHARERS AND RESIDUARIES.

(Rumsey's Muhammadan Family Inheritance, pp. 83—90.*)*

EXAMPLE 1.—Father, mother, and two daughters. Here the shares are :—

Father	...	...	...	$\frac{1}{6}$
Mother	...	...	...	$\frac{1}{6}$
Two daughters		..	...	$\frac{2}{3}$

Hence each daughter's share $= \frac{2}{3} \div 2 = \frac{1}{3}$

Reducing the fractions $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{3}$, to the least common denominator, we have : $\frac{1}{6}$, $\frac{1}{6}$, $\frac{2}{6}$.

Hence the father has	... ...	$\frac{1}{6}$
,, mother	... ...	$\frac{1}{6}$
,, each daughter	...	$\frac{2}{6}$

The property is therefore exactly divided, and there is nothing left for the father to take in his residuary capacity.

EXAMPLE 2.—Father, mother, and ten daughters. Here we have:—

Father	... ...	$\frac{1}{6}$
Mother	.. ..	$\frac{1}{6}$
Ten daughters	... ...	$\frac{2}{3}$

or each daughter $\frac{2}{3} \div 10 = \frac{1}{15}$.

Reducing to the L. C. D., we have: $\frac{5}{30}, \frac{5}{30}, \frac{2}{30}$

Hence the father has	.. ..	$\frac{5}{30}$
,, mother	... ...	$\frac{5}{30}$
,, each daughter	..	$\frac{2}{30}$

Here, as in the last case, the property is exhausted.

EXAMPLE 3.—Father, mother, and five daughters:—

Father	... ...	$\frac{1}{6}$
Mother	... ...	$\frac{1}{6}$
Each daughter	... ...	$\frac{2}{3} \div 5 = \frac{2}{15}$

Reducing to the L. C. D., we have:—

Father	... ...	$\frac{5}{30}$
Mother	... ...	$\frac{5}{30}$
Each daughter	... ...	$\frac{4}{30}$

Here, also, the property is exhausted.

EXAMPLE 4.—Six daughters, three Tr. grandmothers, and three paternal uncles.

Here the three paternal uncles are residuaries; the shares are:—

6 daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3} \div 6 = \frac{1}{9}$

3 Tr. grandmothers $\frac{1}{6}$, ∴ each Tr. grandmother $\frac{1}{6} \div 3 = \frac{1}{18}$.

Here it is clear that the property is not exhausted by the sharers. To find the fractional part remaining for the residuaries after payment of the shares, we must subtract the shares from unity, or the whole; hence we have:—

Residue $1-\frac{2}{3}-\frac{1}{6}=1-\frac{5}{6}=\frac{1}{6}$

Each paternal uncle $\frac{1}{6}\div 3=\frac{1}{18}$

Reducing to the L. C. D.:—

Each daughter	...	...	$\frac{2}{18}$
Each tr. grandmother ...		...	$\frac{1}{18}$
Each pat. uncle	...	...	$\frac{1}{18}$

EXAMPLE 5.—Four wives, three tr. grandmothers, and twelve paternal uncles.

The paternal uncles are residuaries. The shares are:—

Four wives $\frac{1}{4}$, ∴ each $\frac{1}{4}\div 4=\frac{1}{16}$

Three tr. grandmothers $\frac{1}{6}$, ∴ each $\frac{1}{6}\div 3=\frac{1}{18}$

The part remaining for the residuaries is found as in the previous example, and we have:—

Residue $1-\frac{1}{4}-\frac{1}{6}=1-\frac{5}{12}=\frac{7}{12}$

Each pat. uncle $\frac{7}{12}\div 12=\frac{7}{144}$

Reducing to the L. C. D.:—

Each wife ...	...	...	$\frac{9}{144}$
Each tr. grandmother		...	$\frac{8}{144}$
Each paternal uncle ...		...	$\frac{7}{144}$

EXAMPLE 6.—Four wives, eighteen daughters, fifteen tr. female ancestors,* and six paternal uncles. Here we have:—

4 wives $\frac{1}{8}$, ∴ each wife $\frac{1}{8}\div 4=\frac{1}{32}$

18 daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3}\div 18=\frac{1}{27}$

---

* *i.e.* true grandmothers, *vide supra*, 14. The reader must remember that these must be all on the same level, as even a single tr. grandmother in a nearer generation would exclude all the rest (*vide infra*, Chap. X). Consequently the circumstances of this and several other examples are simply impossible, but they were probably framed by the Arabian lawyers for the purpose of testing the skill of their pupils.

15 tr. grandmothers $\frac{1}{6}$, ∴ each tr. grandmother

$\frac{1}{6} \div 15 = \frac{1}{90}$

The portion remaining for the residuaries is :—

$1 - \frac{1}{8} - \frac{2}{3} - \frac{1}{6} = 1 - \frac{23}{24} = \frac{1}{24}$

Each paternal uncle $\frac{1}{24} \div 6 = \frac{1}{144}$

Reducing to the L. C. D. :—

Each wife	...	...	$\frac{135}{4320}$
Each daughter	...	...	$\frac{160}{4320}$
Each tr. grandmother		...	$\frac{48}{4320}$
Each paternal uncle		...	$\frac{30}{4320}$

EXAMPLE 7.—Two wives, six tr. female ancestors,* ten daughters, and seven paternal uncles. Here we have :—

2 wives $\frac{1}{8}$, ∴ each wife $\frac{1}{8} \div 2 = \frac{1}{16}$

6 tr grandmothers $\frac{1}{6}$, ∴ each tr. grandmother $\frac{1}{6} \div 6 = \frac{1}{36}$

10 daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3} \div 10 = \frac{1}{15}$

Consequently there remains for the residuaries:—

$1 - \frac{1}{8} - \frac{1}{6} - \frac{2}{3} = 1 - \frac{23}{24} = \frac{1}{24}$

Each paternal uncle $\frac{1}{24} \div 7 = \frac{1}{168}$

Reducing to the L. C. D.—

Each wife	...	...	$\frac{315}{5040}$
Each tr. grandmother	..	...	$\frac{140}{5040}$
Each daughter	...	...	$\frac{336}{5040}$
Each paternal uncle	...	..	$\frac{30}{5040}$

EXAMPLE 8.—One wife, eight daughters, and four paternal uncles. Here we have :—

One wife $\frac{1}{8}$

Eight daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3} \div 8 = \frac{1}{12}$

To find the portion of the residuaries :—

$1 - \frac{1}{8} - \frac{2}{3} = 1 - \frac{19}{24} = \frac{5}{24}$

Each paternal uncle $\frac{5}{24} - 4 = \frac{5}{96}$

Reducing to the L. C. D. :—

* See note to the preceding page.

Wife	...	..	...	$\frac{12}{96}$
Each daughter	...	...		$\frac{8}{96}$
Each paternal uncle*	...	...		$\frac{5}{96}$

EXAMPLE 9.—Husband, mother, father. Here, remembering that the mother, under the particular circumstances, only takes a third of the residue after deducting the husband's share, we have :—

Husband, $\frac{1}{2}$

Mother, $\frac{1}{3}$ of $(1-\frac{1}{2})$, or $\frac{1}{6}$

Father (as sharer), $\frac{1}{6}$; (as residuary), $1-(\frac{1}{2}+\frac{2}{6})$, or $\frac{1}{6}$; total, $\frac{1}{3}$

Reducing to the L. C. D. :—

Husband	...	...	...	$\frac{3}{6}$
Mother	...	...	...	$\frac{1}{6}$
Father	...	...	...	$\frac{2}{6}$

EXAMPLE 10.—Wife, mother, father. Here in like manner, the mother only takes a third of the residue after deducting the wife's share, and we have :—

Wife, $\frac{1}{4}$

Mother, $\frac{1}{3}$ of $(1-\frac{1}{4})$, or $\frac{1}{4}$

Father (as sharer), $\frac{1}{6}$; (as residuary), $1-(\frac{1}{4}+\frac{1}{4}+\frac{1}{6})$, or $\frac{1}{3}$; total, $\frac{1}{2}$

Reducing to the L. C. D. :—

Wife	...	...	...	$\frac{3}{12}$
Mother	...	...	...	$\frac{3}{12}$
Father	...	...	...	$\frac{6}{12}$

* In this example there is an arithmetical error in Macn. Princ. 172. It is there stated that the share of each paternal uncle is $\frac{4}{96}$. But it is of course plain that this would not exhaust the property, since :—

$$\frac{12}{96}+\frac{8\times 8}{96}+\frac{4\times 4}{96}=\frac{12+46+16}{96}=\frac{82}{96}$$

while on the other hand it will easily be seen that the division above given exhausts the whole, or, in Mr. Macnaghten's words, "makes up the required number 96;" for

$$\frac{12}{96}+\frac{8\times 8}{96}+\frac{5\times 4}{96}=\frac{12+64\times 20}{96}=\frac{96}{96}=1$$

EXAMPLE 11.—Husband, mother, pat. uncle. One of the claimants agrees to take a specific article in lieu of his portion.*

The portions are, primarily:—

Husband	...	...	...	$\frac{1}{2}$
Mother	...	...	...	$\frac{1}{3}$
Pat. uncle, residue		...	...	$\frac{1}{6}$

First, let the husband agree to retain his wife's bridal gifts which he has not paid, and set it off against his claim. Then we have:—

Mother and pat. uncle, to share the remainder, or general estate, in the ratio $\frac{1}{3} : \frac{1}{6}$, or 2 : 1.

Hence we have:—

Mother	...	...	..	$\frac{2}{3}$
Pat. uncle	...	...	...	$\frac{1}{3}$

Secondly, let the mother agree to take a jewel instead of her share. Then we have:—

Husband and pat. uncle to take in the ratio $\frac{1}{2} : \frac{1}{6}$ or 3 : 1.

Therefore we have:—

Husband	..	..	...	$\frac{3}{4}$
Pat. uncle	...	...	..	$\frac{1}{4}$

Thirdly, let the pat. uncle take a carriage, or a slave, instead of his portion. Then we have:—

Husband and mother to take in the ratio $\frac{1}{2} : \frac{1}{3}$, or 3 : 2.

Hence we have.—

Husband	...	...	$\frac{3}{5}$
Mother	...	...	$\frac{2}{5}$

EXAMPLE 12.—Mother, two U. sisters, pat. uncle's son. One of the U. sisters agrees to take a female slave instead of her portion. Primarily, the portions are:—

* This and the following example present instances of what is called subtraction (*supra*, 13). They are worked by the rule of "proportional parts," which is also used in cases of return.—*Vide infra*, Chap. VIII.

Mother, $\frac{1}{6}$
Two U. sisters, $\frac{1}{3}$; each, $\frac{1}{6}$
Pat. uncle's son residue, $\frac{1}{2}$

But, as one U. sister disappears, the remaining property must be divided among the mother, the other U. sister, and the pat. uncle's son, in the ratio $\frac{1}{6}$: $\frac{1}{6}$: $\frac{1}{2}$, or 1 : 1 : 3. Hence we have:—

Mother	...	...	$\frac{1}{5}$
U. sister	...	...	$\frac{1}{5}$
Pat. uncle's son ...		...	$\frac{3}{5}$

When the fractions have been ascertained in the manner shown in the above examples, it only remains, of course, to divide the property into the number of parts indicated by the L. C. D., and to give to each sharer or residuary as many of those parts as are indicated by the numerator of his particular fraction. Thus, for instance, in Example 8, the whole will be divided into 96 parts, of which 12 will be given to the wife, 8 to each daughter, and 5 to each paternal uncle.

EXAMPLES OF THE DIVISION OF PROPERTY AMONG DIFFERENT HEIRS.

(Manual of Muhammadan Law by Abdullah Fyaz and Fazlul-Qadir, B. A., pp. 13—20.)

EXAMPLE 1.—Father, mother, and 10 daughters. Here we have:—

Father$=\frac{1}{6}$.

Mother$=\frac{1}{6}$.

10 daughters$=\frac{2}{3}$, or each$=\frac{2}{3}\div 10=\frac{1}{15}$.

Now $\frac{1}{6}+\frac{1}{6}+\frac{2}{3}=\frac{6}{6}$ or 1. Therefore the property is exhausted.

Reducing the fractions $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{15}$, to the Least Common Denominator, we have :—

Father$=\frac{5}{30}$.

Mother$=\frac{5}{30}$.

Each daughter$=\frac{2}{30}$.

EXAMPLE 4.—4 sons and 2 daughters.

Now since daughters are made residuaries with sons, and as each son takes double the share of each daughter, we have :—

4 sons$=$8 daughters$+$2 daughters$=$10 daughters.

$\therefore$ the property must be divided into 10 shares, of which 8 will go to the sons and 2 to the daughters.

Or the sons will each take 2 and daughters each 1 ;

$1\div10=\frac{1}{10}=$each daughter's share.

$\therefore$ each son's share$=\frac{2}{10}$.

EXAMPLE 5.—Wife, daughter, mother, uncle.

Wife$=\frac{1}{8}$

Daughter$=\frac{1}{2}$

Mother$=\frac{1}{3}$ $\qquad (3+12+8)$

Uncle$=1-(\frac{1}{8}+\frac{1}{2}+\frac{1}{3})=1-\frac{23}{24}$

$=1-\frac{23}{24}=\frac{1}{24}$.

Reducing $\frac{1}{8}$, $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{24}$ to L. C. D we have :—

Wife$=\frac{3}{24}$; daughter$=\frac{12}{24}$; mother$=\frac{8}{24}$; uncle$=\frac{1}{24}$.

EXAMALE 6.—Husband, father, mother.

Husband$=\frac{1}{2}$

Mother$=\frac{1}{6}$

Father$=\frac{1}{6}$ $\qquad (3+1+1)$

Now $1-(\frac{1}{2}+\frac{1}{6}+\frac{1}{6})=1-\frac{5}{6}=1-\frac{5}{6}=\frac{1}{6}$

$\therefore$ the residue will also revert to the father in his residuary capacity.

$\therefore$father$=\frac{1}{6}+\frac{1}{6}=\frac{2}{6}$ or $\frac{1}{3}$

Reducing $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{3}$, we have :—

Husband $=\frac{3}{6}$; mother $=\frac{1}{6}$; father $=\frac{2}{6}$.

EXAMPLE 7.—Husband, daughter, brother, & 3 sisters.

Husband $= \frac{1}{4}$

Daughter $= \frac{1}{2}$

$$\left.\begin{array}{l}\text{Brother \& 3 sisters}\\ \quad\text{(Residuaries)}\end{array}\right\} = 1-(\tfrac{1}{4}+\tfrac{1}{2}) = 1-\tfrac{3}{4} = \tfrac{1}{4}$$

But brother being = 2 sisters + 3 sisters = 5 sisters.

∴ the residue $\frac{1}{4}$ must be divided into 5 shares; each sister $= \frac{1}{5}$ of $\frac{1}{4} = \frac{1}{20}$, and each brother $= \frac{2}{5}$ of $\frac{1}{4} = \frac{1}{10}$.

Reducing $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{10}$, $\frac{1}{20}$, to L. C. D., we have:—

Husband $= \frac{5}{20}$; daughter $= \frac{10}{20}$; brother $= \frac{2}{20}$; each sister $= \frac{1}{20}$.

EXAMPLE 8.—Husband, father, mother, 2 sons, and 3 daughters and a brother.

Husband $= \frac{1}{4}$

Father $= \frac{1}{6}$ (here he is not a residuary as well by the presence of the son).

Mother $= \frac{1}{6}$

$$\left.\begin{array}{l}\text{2 sons and 3 daughters.}\\ \quad\text{(Residuaries).}\end{array}\right\} = 1-(\tfrac{1}{4}+\tfrac{1}{6}+\tfrac{1}{6}) = 1-\frac{3+2+2}{12}$$

$$= 1-\tfrac{7}{12} = \tfrac{5}{12}$$

But 2 sons and 3 daughters = 7 daughters.

∴ each daughter $= \frac{5}{12} \div 7 = \frac{5}{84}$

∴ each son $= \frac{5}{42}$

Brother is excluded by father and son.

Reducing $\frac{1}{4}$, $\frac{1}{6}$, $\frac{1}{6}$, $\frac{5}{42}$ and $\frac{5}{84}$ to L. C. D., we have:—

Husband $= \frac{21}{84}$

Father $= \frac{14}{84}$.

Mother $= \frac{14}{84}$.

Each son $= \frac{10}{84}$.

Each daughter $= \frac{5}{84}$.

EXAMPLE 9.—Wife, 4 brothers' sons, 1 sister and 1 uncle's son.

Wife $= \frac{1}{4}$

Sister $= \frac{1}{2}$

Uncle's son excluded by brothers' sons.

Residue $1-(\frac{1}{2}+\frac{1}{4})=1-\frac{3}{4}=\frac{1}{4}$, to be divided among 4 brothers' sons.

$\therefore$ each brother's son $= \frac{1}{4} \div 4 = \frac{1}{16}$.

Reducing $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{16}$ to the L. C. D., we have :—

Wife $= \frac{4}{16}$; sister $= \frac{8}{16}$; each brother's son $= \frac{1}{16}$

EXAMPLE 12.—Wife, daughter, 3 son's daughters, and father.

Wife $= \frac{1}{8}$.

Daughter $= \frac{1}{2}$.

3 son's daughters $= \frac{1}{6}$ $\therefore$ each $= \dfrac{1}{6 \times 3} = \frac{1}{18}$.

$$\left.\begin{array}{l}\text{Father}\\ \text{(residuary)}\end{array}\right\} = 1-(\tfrac{1}{8}+\tfrac{1}{2}+\tfrac{1}{6}) = 1-\tfrac{19}{24} = \tfrac{5}{24}.$$

Reducing $\frac{1}{8}$, $\frac{1}{2}$, $\frac{1}{18}$, $\frac{5}{24}$ to the L. C. D., we have :—

Wife $= \frac{9}{72}$.

Daughter $= \frac{31}{72}$.

Each son's daughter $= \frac{4}{72}$.

Father $= \frac{20}{72}$.

EXAMPLE 13.—Wife, 2 daughters, son's daughter, 5 brothers.

Wife $= \frac{1}{8}$.

2 daughters $= \frac{2}{3}$.

Son's daughter is excluded by 2 daughters.

$$\left.\begin{array}{l}\text{5 brothers}\\ \text{(residuaries)}\end{array}\right\} = 1-(\tfrac{1}{8}+\tfrac{2}{3}) = 1-\tfrac{19}{24} = \tfrac{5}{24}.$$

$\therefore$ each brother $= \frac{5}{24} \div 5 = \frac{1}{24}$.

Reducing $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{24}$ to the L. C. D., we have :—

Wife $= \frac{3}{24}$; daughters $= \frac{16}{24}$, or each $= \frac{8}{24}$.

And each brother $= \frac{1}{24}$.

OF THE INCREASE AND RETURN.

(Rumsey's Muhammadan Family Inheritance, pp. 110—119.)

It is obvious that, in a system involving the division of unity into a number of arbitrary fractional parts, it may happen that the fractions when added together are sometimes greater, and sometimes less, than the whole. The former contingency, of course, occasions a difficulty whenever it occurs, the latter only when there are no residuaries. The doctrine of the "Increase" (*aul*) provides for the former class of cases; and that of the "Return" (*rudd*) for the latter.

The Increase is the division of the property into a larger number of parts than that indicated by the least common denominator of the fractional shares. The rule is, to increase the L. C. D. so as to make it equal to the sum of the numerators; in other words, to the aggregate number of parts required.

Example 1.—Husband, father, mother, daughter.

Husband	...	...	$\frac{1}{4}$
Father	...	..	$\frac{1}{6}$
Mother	...	...	$\frac{1}{6}$
Daughter	..	..	$\frac{1}{2}$

Reducing these to the L. C. D. we have:—

$$\frac{3}{12}, \frac{2}{12}, \frac{2}{12}, \frac{6}{12};$$

that is, in all, $\frac{13}{12}$, which would be more than the whole. Increasing the number of parts (that is, the L. C. D.) to 13, we have:—

Husband	...	...	$\frac{3}{13}$
Father	..	...	$\frac{2}{13}$
Mother	...	..	$\frac{2}{13}$
Daughter	...	...	$\frac{6}{13}$

It is evident that the sum of the fractions will now be $\frac{13}{13}$ or 1; that is to say, it will exactly exhaust the whole.

The above rule is so extremely simple, that the reader will perhaps fail to perceive at the first glance that the property has been justly divided among the claimants in the exact ratio of their original shares. Such, however, is the case, for it is obvious that,—

$$\tfrac{3}{13} : \tfrac{2}{13} : \tfrac{2}{13} : \tfrac{6}{13} = 3 : 2 : 2 : 6 = \tfrac{3}{12} : \tfrac{2}{12} : \tfrac{2}{12} : \tfrac{6}{12}\,*$$

EXAMPLE 2.—Husband, mother, sister.

Husband	...	...	$\frac{1}{2}$
Mother	...	...	$\frac{1}{3}$
Sister	...	...	$\frac{1}{2}$

But $\frac{1}{2}+\frac{1}{3}+\frac{1}{2}=\frac{3}{6}+\frac{2}{6}+\frac{3}{6}=\frac{8}{6}$.

Hence this is a case of increase, and the denominator must be increased to 8; we shall then have:—

Husband	...	...	$\frac{3}{8}$
Mother	...	...	$\frac{2}{8}$
Sister	...	...	$\frac{3}{8}$

EXAMPLE 3.—Husband, two sisters, two U. sisters, mother.†

Husband	...	...	$\frac{1}{2}$
Two sisters	...	...	$\frac{2}{3}$
Two U. sisters...		...	$\frac{1}{3}$
Mother	...	...	$\frac{1}{6}$

But $\frac{1}{2}+\frac{2}{3}+\frac{1}{3}+\frac{1}{6}=\frac{3}{6}+\frac{4}{6}+\frac{2}{6}+\frac{1}{6}=\frac{10}{6}$.

Hence the denominator must be increased to 10; and we have:—

---

* Where there are several claimants for one original share, it may sometimes be found more convenient to increase the denominator at a later stage, and, of course, the effect will be the same.

† This case is known as the case of Shuraihiyya, after Shuraih, the Judge who decided it. It is taken from Shar. 83, 84, and is valuable as an example of the succession of U. sisters notwithstanding the presence of the mother and of sisters.—*Vide infra*, Chap. X.

Husband ...	...	$\frac{3}{10}$
Two sisters ..	..	$\frac{4}{10}$; each $\frac{1}{5}$, or $\frac{2}{10}$
Two U. sisters	...	$\frac{2}{10}$; each $\frac{1}{10}$
Mother ...	...	$\frac{1}{10}$

EXAMPLE 4.—Wife, father, mother, two daughters.*

Wife ...	...	$\frac{1}{8}$
Father ...	...	$\frac{1}{6}$
Mother	...	$\frac{1}{6}$
Two daughters	...	$\frac{2}{3}$.

But $\frac{1}{8} + \frac{1}{6} + \frac{1}{6} + \frac{2}{3} = \frac{3}{24} + \frac{4}{24} + \frac{4}{24} + \frac{16}{24} = \frac{27}{24}$.

Hence the denominator must be increased to 27; and we have:—

Wife ...	...	$\frac{3}{27}$
Father ...	...	$\frac{4}{27}$
Mother ...	...	$\frac{4}{27}$
Two daughters	...	$\frac{16}{27}$; each $\frac{8}{27}$

The Sir., in the chapter on the increase, states that particular "divisors" (*i. e.*, the least common denominators of the original shares) may be increased in particular ways (*e. g.*, 6 to 10, 12 to 17, &c.), which might, at first sight, be thought to imply that no other mode of increase is allowable.† But this does not seem to be a correct view of the doctrine of the increase, which, from the actual definition given in the Sir., appears to be applicable to all cases in which the L. C. D is insufficient.‡ It may fairly be concluded, therefore, that the statements as to particular "divisors" are only made in that spirit of yearning for enumeration which is so frequently to be discerned in the Sir., and that if any other instances are found possible, they

* This is called the case of *Mimberiyya*, having been decided by Ali when in the *mimbar*, or pulpit at Cufa.

† Sir. 15; 18, 19.

‡ "Aul, or *increase*, is when some fraction remains above the *regular* divisor, or when the divisor is too small to admit of one share."—Sir. 15; 18.

must be considered good law. The disputed case of increase to 31, in the same place, turns, not really on the doctrine of the increase, but on the question whether persons incapable of inheriting can exclude imperfectly.

The Return is the apportionment of the surplus among the sharers (except husband and wife,* who are not allowed to partake of it), when the sharers do not exhaust the property and there are no residuaries. Zaid, the son of Thabit, and some other lawyers, have maintained that there is no return, but that the surplus goes to the public treasury; but the author of the Sir. considers the opposite opinion to be correct, on the authority of all the Prophet's companions, including Ali and his followers, and also of the sages whom he calls "our masters."† Residuaries for special cause, however, take precedence of the return.‡

The rule is, that the surplus is distributed among the sharers in the ratio of their respective shares. In cases of return, as in the primary distribution, we shall solve the examples by the rules of modern arithmetic.

EXAMPLE 5.—Two daughters.

It is obvious that, as the two daughters divide, first, their proper share, $\frac{2}{3}$, and then the return, equally, they divide the whole equally. We have:—

Each daughter's ultimate share|| $\frac{1}{2}$. The ultimate share of each of two sisters, &c., would of course be arrived at in the same way.

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* Examples illustrative of this doctrine will be found *infra*, 116, &c. Although the husband and wife have not, technically speaking, any return, yet there are instances in which the whole residue has been said to revert to them *supra*, 44.

† Sir. 22; 27.

‡ *Vide infra*, Chap XIII.

|| We have used the words ultimate share for the sake of brevity to express *share added to return*.

EXAMPLE 6.*—Mother and 2 daughters.

Mother $\frac{1}{6}$

Daughters, $\frac{2}{3}$ ∴ each daughter $\frac{1}{3}$.

The whole must therefore be divided in the ratio $\frac{1}{6} : \frac{2}{3}$ or 1 : 4. Consequently we have :—

Mother's ultimate share	...	$\frac{1}{5}$ of $1 = \frac{1}{5}$
Daughter's ultimate share	...	$\frac{4}{5}$ of $1 = \frac{4}{5}$ †
Each daughter ...	...	$\frac{2}{5}$

EXAMPLE 7.—Husband and 3 daughters.

Here it is obvious that, as the husband has no return, the daughters, as sharers and by return, must take all the rest. Therefore the $\frac{3}{4}$ left after payment of his share will be divided among the daughters. Hence we have :—

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* This and some other examples are worked by the rule of "proportional parts." See "Colenso's Arithmetic," or any other modern arithmetical treatise. It is unnecessary to begin by finding the amount of the surplus, as will appear from the following reasoning :—

Let there be a number, $m+n$, and let $m=a+b$. Then, if we divide n (the surplus) in the ratio $a : b$, we have :—

$$\frac{a}{a+b}n, \quad \frac{b}{a+b}n$$

And, if we divide the whole number $m \times n$ in the same ratio, we have :—

$$\frac{a}{a+b}(m+n), \quad \frac{b}{a+b}(m+n)$$

$$\text{but } \frac{a}{a+b}(m+n) = \frac{am+an}{a+b}$$

$$= a + \frac{a}{a+b}n$$

$$\text{Similarly } \frac{b}{a+b}(m+n) = b + \frac{b}{a+b}n$$

Whence it appears that if we divide the whole estate in the ratio $a : b$ (a and b being the original shares), the result is the same if we divided the surplus in that ratio, and added the parts to the respective shares.

† Mr. Macnaughten (p. 176) divides the surplus into 6, giving the mother 2 and the daughters 4. This is, of course, an error. The result, as given above, is in accordance with the principles of the Sirajiyyah, "The return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it; this surplus is then returned to the sharers *according to their rights*;" in other words (as shown by the examples in the Sirajiyyah, and the universal practice), in the ratio of their original shares. If, in the present instance, we have recourse to the empirical rules of the Sir., we arrive at the same result; for we are told, when there are two-thirds and a sixth, to "settle the case" by five. (Sir. 22; 28.)

Husband	...	$\frac{1}{4}$
Each daughter's ultimate share	...	$\frac{1}{4}$

EXAMPLE 8.—Husband and 6 daughters

Here, as in example 3, we must divide the remaining $\frac{3}{4}$ among the daughters, and we have —

Husband ..	...	... $\frac{1}{4}$
Each daughter's ultimate share	...	$\frac{3}{4} \div 6 = \frac{1}{8}$

Reducing $\frac{1}{4}$ and $\frac{1}{8}$ to the L C. D., we get:—

Husband ...	...	$\frac{2}{8}$
Each daughter's ultimate share	...	$\frac{1}{8}$

EXAMPLE 9.—Husband and 5 daughters

Here we have:—

Each daughter's ultimate share, $\frac{3}{4} \div 5 = \frac{3}{20}$

Reducing $\frac{1}{4}$ and $\frac{3}{20}$ to the L. C D, we have —

Husband ..	...	... $\frac{5}{20}$
Each daughter's ultimate share	...	$\frac{3}{20}$

EXAMPLE 10.—Wife, 4 tr. paternal grandmothers, 6 U. sisters.*

Wife ..	...	... $\frac{1}{4}$
Paternal grandmothers ..		... $\frac{1}{6}$
Uterine sisters	...	... $\frac{1}{3}$

As the wife has no return, the paternal grandmothers and U sisters will have all after payment of her $\frac{1}{4}$ Hence we have $1-\frac{1}{4}$ or $\frac{3}{4}$ to be divided in the ratio† of $\frac{1}{6} : \frac{1}{3}$ or 1 : 2.

---

* In this and the following example, we have put "tr. paternal grandmothers,' because the cases are so stated in Macnaughten, but the reader will readily see that, if the word paternal were omitted, the result would be precisely the same—*Vide* Table of Sharers, *supra*, 17, &c, and Rules of Exclusion, *infra*, Chap X

† As in example 6, so in this and any similar example, it is not necessary first to find the actual surplus, for if we have a number $m \times n \times p$ and $n = a \times b$, and we divide p (the actual surplus) in the ratio a b, we get —

$$\frac{a}{a+b}\,p,\ \frac{b}{a+b}\,p$$

Tr. paternal grandmothers, $\frac{1}{3}$ of $\frac{3}{4}=\frac{1}{4}$; each $\frac{1}{16}$

Uterine sisters, $\frac{2}{3}$ of $\frac{3}{4}=\frac{1}{2}$; each $\frac{1}{12}$

Reducing to the L. C. D.:—

Wife $\frac{12}{48}$

Each tr. pat. grandmother, $\frac{3}{48}$

Each uterine sister, $\frac{4}{48}$

EXAMPLE 11.—Wife, 9 daughters, 6 tr. paternal grandmothers.

Wife, $\frac{1}{8}$

Daughters, $\frac{2}{3}$

Tr. paternal grandmothers, $\frac{1}{6}$

Deducting the wife's share, as she has no return, we have $1-\frac{1}{8}$, or $\frac{7}{8}$, to be divided in the ratio $\frac{2}{3}:\frac{1}{6}$, or $4:1$.

Daughters' ultimate share, $\frac{4}{5}$ of $\frac{7}{8}=\frac{7}{10}$; each $\frac{7}{90}$

Tr. paternal grandmothers' ultimate share, $\frac{1}{5}$ of $\frac{7}{8}=\frac{7}{40}$; each $\frac{7}{240}$

Reducing $\frac{1}{8}$, $\frac{7}{90}$, $\frac{7}{240}$, to the L. C. D., we have:—

Wife, $\frac{90}{720}$

Each daughter, $\frac{56}{720}$

Each tr. paternal grandmother, $\frac{21}{720}$

In the simpler class of cases, where there is no person who is not entitled to partake of the return, the problems may be still more easily solved by merely diminishing the

---

And if we divide $n\times p$ (the whole property less the wife's share) in the same ratio, we get:—

$$\frac{a}{a+b}(n+p), \frac{b}{a\times b}(n+p)$$

$$\text{but } \frac{a}{a+b}(n+p)=\frac{an+ap}{a+b}$$

$$=a+\frac{a}{a+b}p$$

$$\text{Similarly } \frac{b}{a+b}(n+p)=b+\frac{b}{a+b}p$$

Consequently, the result obtained by dividing the whole property less the wife's share in the ratio of the other shares is the same as that obtained by so dividing the actual surplus and adding the quantities thus obtained to the other shares.

entire number of parts, or L. C. D. of the original shares so as to make it equal to the aggregate number of parts required. Thus, from example 6, p. 115, we have:—

Mother, $\frac{1}{6}$
Each daughter, $\frac{1}{3}$, or $\frac{2}{6}$

Therefore, in all,

$\frac{1}{6}$, $\frac{2}{6}$, $\frac{2}{6}$, or $\frac{5}{6}$

Diminishing the L. C. D. to 5 we have $\frac{5}{5}$, and the division will be

Mother, $\frac{1}{5}$
Each daughter, $\frac{2}{5}$*

---

* This simple method may be proved in the same way as the "increase" (*supra*, 111). It occurred to the author, long after the issue of the first edition of this work, from pondering over the words, "the return is the converse of the increase" (Sir 21 , 27).

OF VESTED INHERITANCES.

(*Rumsey's Muhammadan Family Inheritance, pp.* 120—123.)

When a person who has inherited a portion from another dies before the estate has been distributed, his portion vests at once in his own heirs. Consequently, when the actual distribution is effected, his share or portion must be divided among those entitled to inherit from him, some of whom may be entitled to inherit from the first deceased and some not. It is usual to state the portions of those who ultimately succeed in fractions of the original estate. We shall show how this may be done, by working out an example (slightly altered from Macn. Princ. 181) by means of ordinary arithmetic.

Example.—Wife: *by her*, 2 sons and 2 daughters; wife dies, leaving a father; then one daughter dies, leaving a husband.

Here we have first to consider what would be the portions if the wife and daughter had not died. Remembering that the wife is a sharer, and that the children are residuaries, we have:—

Wife, $\frac{1}{8}$

Residue $1-\frac{1}{8}=\frac{7}{8}$, to be divided in the ratio 4 : 2, or 2 : 1.

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$; each $\frac{7}{24}$

Daughters, $\frac{1}{3}$ of $\frac{7}{8}=\frac{7}{24}$; each $\frac{7}{48}$

Now the wife dies, leaving her father a sharer, and the four children residuaries.

Wife's father, $\frac{1}{6}$ of $\frac{1}{8}=\frac{1}{48}$

Residue $1-\frac{1}{6}=\frac{5}{6}$, to be divided in the same ratio as the former residue, hence:—

Each son, $\frac{1}{3}$ of $\frac{5}{6}$ of $\frac{1}{8}=\frac{5}{144}$

Each daughter, $\frac{5}{288}$

Adding these to the original portions, we have:—

Each son, $\frac{7}{24} + \frac{5}{144} = \frac{47}{144}$

Each daughter, $\frac{47}{288}$

Lastly, one daughter dies, leaving her husband a sharer, and two sons (her brothers), and a daughter (her sister), residuaries. The wife's father, being a false grandfather of the daughter, takes nothing from her,* as she has heirs living, and a false grandfather is a d. k.

Daughter's husband, $\frac{1}{2}$ of $\frac{47}{288} = \frac{47}{576}$

Residue $1 - \frac{1}{2} = \frac{1}{2}$, to be divided in the ratio 4 : 1.

Each son, $\frac{2}{5}$ of $\frac{1}{2}$ of $\frac{47}{288} = \frac{47}{1440}$

Daughter, $\frac{47}{2880}$

Adding these to the portions last found, we have:—

Each son, $\frac{47}{144} + \frac{47}{1440} = \frac{517}{1440}$

Daughter, $\frac{47}{288} + \frac{47}{2880} = \frac{517}{2880}$

Reducing $\frac{1}{48}$, $\frac{47}{576}$, $\frac{517}{1440}$, $\frac{517}{2880}$, to the L. C. D., we have:—

Wife's father	...	...	...	$\frac{60}{2880}$
Daughter's husband		...	...	$\frac{235}{2880}$
Each son	...	...	...	$\frac{1034}{2880}$
Daughter	...	...	...	$\frac{517}{2880}$

The Sir. is very brief on the subject of vested inheritances, and does not allude to it as affecting the D. K. But the principle involved is assumed, rather than directed by precept, even as regards the heirs, and appears, in fact, to be alluded to merely for the purpose of giving the requisite arithmetical directions for calculating the

* In the previous editions of this book, "wife's mother" occurred instead of "wife's father." The author, like Mr. Macnaghten before him, overlooked the circumstance that the wife's mother would be a tr. grandmother of the deceased daughter, and would therefore be entitled to $\frac{1}{6}$ of her $\frac{47}{288}$, so as to disturb the ultimate result very considerably. The error was discovered and pointed out by Mr. Alexander C. Tate, a gentleman studying for the Indian Civil Service, to whom the author has much pleasure in tendering his acknowledgments. It is probable that the example was found by Mr. Macnaghten in a correct form in some native treatise, but that the word "mother" was accidentally substituted for "father" in the MS. or the proofsheets of his work.

ultimate shares. The same principle may therefore, it is submitted, be safely assumed as to the D. K., so far as it may be found applicable. Thus, if a man leave three sons of different deceased daughters, and one die before distribution, it may be assumed that the survivors, having originally taken each $\frac{1}{3}$, will now take as follows :—

Surviving daughter's sons, each $\frac{1}{3} + \frac{1}{2}$ of $\frac{1}{3}$, or $\frac{1}{2}$

And, in like manner, if the deceased leave two sons of one deceased daughter, and two sons of another, and one daughter's son die before distribution, it may be reasonably assumed that the portion of the deceased daughter's son will go to his own brother, as his heir, and not to his cousins, who are only his D. K. Thus, as each daughter's son would originally have had $\frac{1}{4}$, the ultimate portions may be assumed to be :—

Two sons of one daughter, each $\frac{1}{4}$

Surviving son of other daughter, $\frac{1}{4} + \frac{1}{4}$, or $\frac{1}{2}$

The above supposed instances are of a very simple kind; but it seems clear that the principle, if recognized, may lead to problems of a varied and important character.

MISCELLANEOUS EXAMPLES ON SHARERS AND RESIDUARIES.*

(*Rumsey's Muhammadan Family Inheritance, pp.* 135 *to* 142.)

We subjoin a few miscellaneous examples, of which the greater parts are taken almost at random from the large mass of precedents of inheritance in Macnaghten's "Principles and Precedents," in order to show the general applicability of the arithmetical methods which we have

* Although the D. K. are occasionally referred to in these examples, the allusion to them is so slight that the above title will not, it is hoped, seem inappropriate.

used above. The reader will find that the results here arrived at coincide with those stated by the native law officers consulted in the several cases.

EXAMPLE 1.—Wife, mother, and sister.

Wife	...	...	...	$\frac{1}{4}$
Mother	...	...	...	$\frac{1}{3}$
Sister	...	...	...	$\frac{1}{2}$

But $\frac{1}{4}+\frac{1}{3}+\frac{1}{2}=\frac{3}{12}+\frac{4}{12}+\frac{6}{12}=\frac{13}{12}$, or more than the whole. The doctrine of the increase therefore applies, and the property must be divided into 13 instead of 12. Hence we have:—

Wife	...	...	...	$\frac{3}{13}$
Mother	...	...	...	$\frac{4}{13}$
Sister	...	...	...	$\frac{6}{13}$

EXAMPLE 2.—Three sons, two daughters, son's son, and wife.

The son's son has nothing, being excluded by the sons; wife $\frac{1}{8}$.

Residue $1-\frac{1}{8}=\frac{7}{8}$. This must be divided in the proportion 6 : 2, or 3 : 1 (since the sons, as compared with the daughters, take double shares). Hence we have:—

Sons, $\frac{3}{4}$ of $\frac{7}{8}=\frac{21}{32}$; each $\frac{7}{32}$

Daughters, $\frac{1}{4}$ of $\frac{7}{8}=\frac{7}{32}$; each $\frac{7}{64}$

Reducing $\frac{1}{8}$, $\frac{7}{32}$, $\frac{7}{64}$, to the L. C. D., we have:—

Wife	...	...	...	$\frac{8}{64}$
Each son	...	...	...	$\frac{14}{64}$
Each daughter		...	...	$\frac{7}{64}$

EXAMPLE 3.—Wife, mother and two sons.

Wife	..	...	...	$\frac{1}{8}$
Mother	...	...	...	$\frac{1}{6}$

Residue, $1-\frac{1}{8}-\frac{1}{6}=1-\frac{7}{24}=\frac{17}{24}$

Each son	...	...	$\frac{17}{48}$

Reducing $\frac{1}{8}$, $\frac{1}{6}$, $\frac{17}{48}$, to the L. C. D., we have :—

Wife	...	...	...	$\frac{6}{48}$
Mother	...	...	...	$\frac{8}{48}$
Each son	...	...	...	$\frac{17}{48}$

EXAMPLE 4.—Wife, four brothers' sons, sister, and uncle's son.

Wife	...	...	...	$\frac{1}{4}$
Sister	...	...	...	$\frac{1}{2}$

Uncle's son excluded by brothers' sons.

Residue $1-\frac{1}{4}-\frac{1}{2}=1-\frac{3}{4}=\frac{1}{4}$, ∴ each brother's son $\frac{1}{16}$

Reducing $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{16}$, to the L. C. D., we have :—

Wife	...	...	...	$\frac{4}{16}$
Sister	...	...	...	$\frac{8}{16}$
Each brother's son		...	...	$\frac{1}{16}$

EXAMPLE 5.—Three wives, six sons, six daughters.

Wives, $\frac{1}{8}$, ∴ each $\frac{1}{24}$

Residue $1-\frac{1}{8}=\frac{7}{8}$; to be divided in the ratio 12 : 6, or 2 : 1. Hence we have :—

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$, ∴ each $\frac{7}{72}$

Daughters, $\frac{1}{3}$ of $\frac{7}{8}=\frac{7}{24}$; each $\frac{7}{144}$

Reducing $\frac{1}{24}$, $\frac{7}{72}$, $\frac{7}{144}$, to the L. C. D., we have :—

Each wife	...	...	...	$\frac{6}{144}$
Each son	...	...	...	$\frac{14}{144}$
Each daughter...		...	...	$\frac{7}{144}$

EXAMPLE 6.—Wife; *by her*, three sons, B., C., D., and two daughters E., F.; *by another wife*, a daughter G.; before distribution, the wife, B., C., and G. die successively. This is a case of vested "inheritance."

Wife	...	...	...	$\frac{1}{8}$

Residue $1-\frac{1}{8}=\frac{7}{8}$, to be divided in the ratio 6 : 3, or 2 : 1.

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$; each $\frac{7}{36}$

Daughters, each $\frac{7}{72}$

Now the wife dies, and her share is divided among her own sons and daughters (G. is not her daughter, and takes nothing from her) in the ratio 6: 2, or 3: 1. Hence we have :—

Sons, $\frac{3}{4}$ of $\frac{1}{8} = \frac{3}{32}$; each $\frac{1}{32}$
E. and F., each $\frac{1}{64}$

Hence, adding these to the original shares :—

Sons, each $\frac{7}{36} + \frac{1}{32} = \frac{65}{288}$
E. and F., each $\frac{65}{576}$
G. (as before), $\frac{7}{72}$

Next the son B. dies; G., being a C. sister, is excluded by the actual brothers, and B.'s portion is divided between C. D. and E. F., in the ratio 4: 2, or 2: 1. Hence :—

C. D., $\frac{2}{3}$ of $\frac{65}{288} = \frac{65}{432}$; each $\frac{65}{864}$
E. F., each $\frac{65}{1728}$

Adding these to the portions last found, we have :—

C. D., each $\frac{65}{288} + \frac{65}{864} = \frac{260}{864} = \frac{65}{216}$
E. F., each $\frac{65}{432}$
G. (as before), $\frac{7}{72}$

Afterwards C. dies, and his portion goes to D. and E. F. in the ratio 2 : 2, or 1 : 1. Hence :—

D., $\frac{1}{2}$ of $\frac{65}{216} = \frac{65}{432}$
E. F., each $\frac{65}{864}$

Adding as before :—

D., $\frac{65}{216} + \frac{65}{432} = \frac{195}{432} = \frac{65}{144}$
E. F., each $\frac{65}{288}$
G. (as before), $\frac{7}{72}$

Lastly, G. dies, and as she has no brothers or sisters of the whole blood, her portion is divided between D. E. and F. The ratio is again 2 : 2, or 1 : 1, and we get :—

D., $\frac{1}{2}$ of $\frac{7}{72} = \frac{7}{144}$
E. F., each $\frac{7}{288}$

Adding, as before:—

D., $\frac{65}{144} + \frac{7}{144} = \frac{72}{144} = \frac{1}{2}$

E. F.,* each $= \frac{72}{288} = \frac{1}{4}$

Reducing $\frac{1}{2}$, $\frac{1}{4}$, to the L. C. D., we have D. $\frac{2}{4}$, E. F., each $\frac{1}{4}$. The fractions thus obtained are identical with those given in Macnaghten; where, however, they are expressed in the more bulky form of $\frac{864}{1728}$, $\frac{432}{1728}$, for, as we have observed elsewhere, the old Arabian methods provide no rule for reducing fractions to lower terms.†

EXAMPLE 7.—Mother, wife, and daughters of U. brother.

Mother	$\frac{1}{3}$
Wife	$\frac{1}{4}$

The U. brothers' children are distant kindred, and consequently, as there are sharers, they take nothing. But $\frac{1}{3}$ and $\frac{1}{4}$ do not exhaust the whole; therefore, this is a case of return; and, as a wife cannot partake in the return, the mother will get, after payment of the wife's share, all. Hence we have, finally:—

Mother	$\frac{3}{4}$
Wife	$\frac{1}{4}$

EXAMPLE 8.—Husband, mother, and daughter *by former husband*; husband dies before distribution, leaving wife, mother and father; daughter dies after husband, also before distribution, leaving mother's mother (identical, of course, with the mother of the proposita),‡ two sons, and daughter.

* In order to economise space, we have omitted, throughout this example, the actual calculation of the daughters' portions; but the reader can easily work them out, and will find that at each stage they come out as we have given them, *i. e.*, each daughter's portion exactly half of each son's portion. In this case the ultimate result might have been easily foreseen, but we have thought it desirable to work it out, as this is one of the most elaborate cases of vested inheritance given by Macnaghten. † *Vide supra*, 83, note.

‡ Sir. 27; 32. Shar. 91. The author much regrets that, having overlooked the fact that the daughter's mother was identical with the mother of the proposita, he worked out the later stages of this question erroneously in "Al Sirájiyyah reprinted." He would have taken an earlier opportunity of correcting this error, but unfortunately he did not discover it till after the second edition of this work was published.

Afterwards, still before distribution, mother (daughter's mother's mother) dies, leaving husband and two brothers. This is a case of vested inheritance.

Husband	...	...	...	$\frac{1}{4}$
Mother	...	...	...	$\frac{1}{6}$
Daughter	...	...	...	$\frac{1}{2}$

But these fractions do not exhaust the whole, therefore this is a case of return; and, as a husband cannot partake in the return, we have $\frac{1}{12}$ to be divided in the ratio $\frac{1}{6} : \frac{1}{2}$, or 1 : 3, and added to the mother's and daughter's shares, so that we get:—

Mother, $\frac{1}{6}+\frac{1}{4}$ of $\frac{1}{12}$, or $\frac{3}{16}$.

Daughter, $\frac{1}{2}+\frac{3}{4}$ of $\frac{1}{12}$, or $\frac{9}{16}$.

Now the husband dies, and we have:—

Mother and daughter as before.

Husband's wife, $\frac{1}{4}$ of $\frac{1}{4}=\frac{1}{16}$.

Husband's mother, $\frac{1}{3}$ of $(\frac{1}{4}-\frac{1}{16})$, or $\frac{1}{16}$.

Husband's father,* $\frac{1}{4}-\frac{2}{16}$, or $\frac{1}{8}$.

Afterwards the daughter dies, and we have:—

Husband's heirs as before.

Mother (the daughter's mother's mother), $\frac{3}{16}$† $+\frac{1}{6}$ of $\frac{9}{16}$, or $\frac{1}{32}$.

Daughter's sons, each $\frac{2}{5}$ of $\frac{5}{6}$ of $\frac{9}{16}$, or $\frac{3}{16}$.

Daughter's daughter, $\frac{1}{5}$ of $\frac{5}{6}$ of $\frac{9}{16}$, or $\frac{3}{32}$.

Lastly, the mother dies, and we have:—

Husband's heirs and daughter's sons and daughter as before.

Mother's husband, $\frac{1}{2}$ of $\frac{9}{32}$, or $\frac{9}{64}$.

Mother's brothers, each $\frac{1}{2}$ of $\frac{9}{64}$, or $\frac{9}{128}$.

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* The father, it will be remembered, takes all that is left after the other shares when there are no children, *vide supra*, 26.]

† This is the mother's share directly from the *proposita*, as ascertained above.

Reducing the fractions to the L. C. D., we have :—

Husband's wife	...	...	$\frac{8}{128}$.
Husband's mother	...	...	$\frac{8}{128}$.
Husband's father	...	...	$\frac{16}{128}$.
Daughter's sons, each	...	...	$\frac{24}{128}$.
Daughter's daughter	...	...	$\frac{12}{128}$.
Mother's husband	...	...	$\frac{18}{128}$.
Mother's brothers, each	...	...	$\frac{9}{128}$.

EXAMPLES FOR PRACTICE ON SHARERS AND RESIDUARIES.*

(Rumsey's Muhammadan Family Inheritance, pp. 143 *to* 148.*)*

In this, as in our second edition, we have thought it desirable to add a few Examples *not worked out,* in order to stimulate the industry and exercise the ingenuity of the student. These "Examples for Practice" are all taken from the opinions of native law officers recorded in reported cases, with the exception of one or two which have been selected from the Sirájiyyah. The reader must expect to meet with "return," "increase," or some other special feature, in almost every case; for it is rare, in actual practice, to find the simple instances which theoretical instruction provides as a kind of tender fare for the young beginner. With this warning, we commend the "Examples for Practice" to our readers, who, with a thorough knowledge of the preceding part of the book, and a resolute determination not to be beaten, will be sure to be able to give a good account of them.

Example 1.—Husband, father, mother.

Answer.—Husband, $\frac{1}{2}$; father, $\frac{1}{3}$; mother, $\frac{1}{6}$; (or, $\frac{3}{6}$; $\frac{2}{6}$; $\frac{1}{6}$).

Example 2.—Son, daughter. The daughtér dies, and leaves a son, Fuseehoodeen. Fuseehoodeen dies and leaves

* See Note, page 199, of this book.

a son, Ali, and a daughter, Wajida. Ali dies. What portion of the original estate does Wajida take?

Answer.—$\frac{1}{3}$

EXAMPLE 3.—Wife, brother, mother. Mother dies.

Answer.—Wife, $\frac{1}{4}$; brother, $\frac{3}{4}$; (or, $\frac{3}{12}$; $\frac{0}{12}$).

EXAMPLE 4.—Wife, son *by her*, wife's mother, son of half brother.* Son dies.

Answer.—Wife, $\frac{5}{12}$; son of half brother, $\frac{7}{12}$; (or, $\frac{10}{24}$; $\frac{14}{24}$).

EXAMPLE 5.—Two sons, Husun Ali and Himmut Ali, mother, wife Zeinub, the mother of Himmut Ali. Another wife, Zeb-oon-nissa, mother of Husun Ali, and after her, Aloo Thakoor, another son of *propositus* by her, have died before *propositus*. Zeb-oon-nissa's dower† absorbed the whole estate.

Answer.—First: On Zeb-oon-nissa's death *propositus* (her husband), $\frac{1}{4}$; sons Husun Ali and Aloo Thakoor, each $\frac{3}{8}$. Secondly: On Aloo Thakoor's death, his $\frac{3}{8}$ go to *propositus* who therefore has $\frac{5}{8}$. Thirdly: On the death of propositus, the $\frac{5}{8}$ which have come to him will be distributed thus:—mother, $\frac{1}{6}$; wife Zeinub, $\frac{1}{8}$; sons Husun Ali and Himmut Ali, each $\frac{17}{48}$; and the ultimate fractions of the original estate will be (remembering that Husun Ali has $\frac{3}{8}$ already), mother, $\frac{40}{384}$; wife Zeinub, $\frac{30}{384}$; son Husun Ali, $\frac{229}{384}$; son Himmut Ali, $\frac{85}{384}$.

EXAMPLE 6.—Husband, daughter, brother, three sisters.‡

* This must, of course, be a half brother by the father's side, or C. brother. The reader will remember that the U. brother's son is a d. k., and would therefore take nothing in the presence of the wife and son.

† The dower of a wife may be fixed at any amount, however large; and if it should be so large as to absorb the whole estate, it excludes the inheritors, as it is held to be a debt. It descends in the same way as other property; and, consequently, the husband, the very person from whom it is derived, will take his share as an heir if his wife dies before him. The present example affords an instance of that contingency.

‡ This example (as far as it goes) affords an illustration of the doctrine maintained, *supra*, 43, that when there are brothers and sisters and also daughters, the brothers and sisters will take the residue after payment of the daughters' shares, each brother taking a double share.

Answer.—Husband, $\frac{1}{4}$; daughter, $\frac{1}{2}$; brother, $\frac{1}{10}$; sisters, each $\frac{1}{20}$; (or $\frac{5}{20}$, $\frac{10}{20}$, $\frac{2}{20}$, $\frac{1}{20}$).

EXAMPLE 7.—Wife, son *by her*, mother, brother. Son dies, then mother dies.

Answer.—Wife, $\frac{13}{36}$; brother, $\frac{23}{36}$; (or $\frac{26}{72}$, $\frac{46}{72}$).

EXAMPLE 8.—Son, two daughters, Misree Khanum and Jance Khanum, both married to Moohummud Tukee. Son dies. Misree Khanum dies, leaving two sons, Ali Nukee and Husun Uskuree. Jance Khanum dies. Lastly, Husun Uskuree dies.*

Answer.—Moohummud Tukee, $\frac{11}{16}$; Ali Nukee, $\frac{5}{16}$.

EXAMPLE 9.—Two wives, daughter. One wife, leaving *her* daughter's son, who is *not* descended from the *propositus*, dies. The other wife, the mother of the above-mentioned daughter of *propositus*, dies.

Answer.—Wife's daughter's son, $\frac{1}{16}$; daughter, $\frac{15}{16}$

EXAMPLE 10.—Two wives, mother, son. Mother dies. One wife, the mother of the son, dies.

Answer.—Surviving wife, $\frac{1}{16}$; son, $\frac{15}{16}$ (or $\frac{9}{48}$, $\frac{45}{48}$).

EXAMPLE 11.—Wife, two daughters, son (missing).

Answer.—Wife, $\frac{1}{8}$; daughters, each $\frac{7}{16}$; but the missing son's part, $\frac{7}{16}$, to be restored to him if he returns, each daughter giving up $\frac{7}{32}$; (or $\frac{4}{32}$, $\frac{14}{32}$; but, if son returns $\frac{4}{32}$, $\frac{7}{32}$, $\frac{14}{32}$).

EXAMPLE 12.—Wife,† two sons, four daughters. One of

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* This example presents the singular feature of two sisters married to the same man. One sister dies, leaving two sons; the other dies after her, childless. The second sister's property, after the husband has taken half (the lady herself being childless), goes equally between the two sons, as her sister's children, and therefore her own D. K. As her step-children they could, of course, take nothing from her, being, in that character, neither sharers, residuaries, nor distant kindred. It will be observed that this example illustrates the doctrine that a husband has no return (*supra*, Chap. VIII), in a striking manner, the D. K. of Jance Khanum taking what remains after payment of her husband's share.

† It must be assumed that she is not mother of the son who dies, for, if she were, she would partake of his estate.

the sons dies, leaving three sons, *i. e.*, son's sons of the *propositus.*

Wife, $\frac{1}{8}$; son, $\frac{7}{32}$; each daughter, $\frac{7}{64}$; each son's son, $\frac{7}{96}$; (or, $\frac{24}{192}$; $\frac{42}{192}$; $\frac{21}{192}$; $\frac{14}{192}$).

EXAMPLE 13.—Mother, wife Zuhooroonissa and two other wives, daughter Fyzoonissa (being the daughter of Zuhooroonissa), and two other daughters, brother. Daughter Fyzoonissa dies.

Answer.—Mother, $\frac{1}{6}$; wife Zuhooroonissa, $\frac{17}{216}$; other wives, each $\frac{1}{24}$, surviving daughters, each $\frac{8}{27}$; brother, $\frac{17}{216}$; (or, $\frac{36}{216}$; $\frac{17}{216}$; $\frac{9}{216}$; $\frac{64}{216}$; $\frac{17}{216}$).

EXAMPLE 14.—Wife (being father's brother's daughter, or first cousin, of her husband), son, daughter, brother. Son dies; daughter dies, leaving husband, son, and daughter; wife dies, leaving father's brother's son (the brother above mentioned of the propositus); daughter's son dies; brother dies, leaving son; daughter's husband dies, leaving daughter, (the daughter's daughter above mentioned).*

Answer.—Daughter's daughter, $\frac{35}{72}$; brother's son, $\frac{37}{72}$; (or, $\frac{210}{432}$; $\frac{222}{432}$).

EXAMPLE 15.—Wife, *by her,* son Enayut Hosein and daughter, son by a previously deceased wife. Daughter dies, leaving a son and two daughters; wife dies.

Answer.—Son Enayut Hosein, $\frac{121}{240}$; other son, $\frac{7}{20}$; daughter's son, $\frac{7}{96}$; daughter's daughters, each $\frac{7}{192}$; (or, $\frac{484}{960}$; $\frac{336}{960}$; $\frac{70}{960}$; $\frac{35}{960}$).

EXAMPLE 16.—Four wives, nine daughters, six true grandmothers.

Answer.—Wives (each), $\frac{1}{32}$; daughters (each), $\frac{7}{80}$; true grandmothers (each), $\frac{7}{240}$; (or, $\frac{45}{1440}$; $\frac{112}{1440}$; $\frac{42}{1440}$).

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* In this example it must be assumed that the wife is the mother of the son and daughter, and that the daughter's husband is the father of the daughter's son and daughter's daughter.

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OF THE DEMAND OF PRE-EMPTION.

(Baillie's Digest of Muhammadan Law, pp. 487 to 493.)

Three kinds or stages of demand.

THE right of pre-emption is founded on contract and neighbourhood, is confirmed by *tulub*, or demand, and *ish, had*, or invocation, and is perfected by taking possession. The demand is of three kinds: *tulub-moowathubut*,[1] or immediate demand; *tulub-tukreer*, or confirmatory demand, also styled *tulub-ish, had*, or demand with invocation; and *tulub-tumleek*, or demand of possession, also styled *tulub-khusoomut*, or demand by limitation.[2]

Immediate demand.

By *tulub-moowathubut* is meant, that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the instant (whether there is any one by him or not),[3] and when he remains silent without claiming the right, it is lost. This is the report of the Asul, and it is *mushhoor*, or notorious, among 'our' sect; though there is another report as from Muhammad, that demand at any time during the meeting at which the information is received is sufficient. According to the Hidayah, if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning or middle of the letter, and he reads on to the end without making his claim, the right is lost.[4] There is some difference as to the words in which the demand should be expressed; but the correct opinion is that it is lawful in any words that intelligibly express the demand. So that if he would say, 'I have demanded,' or 'do demand pre-emption,' it would be lawful. But if he were to say to the purchaser, 'I am thy *shufee* or pre-emptor,' or 'I take the

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[1] The word means, literally, "jumping up."

[2] Hidayah, Vol. IV, p. 924. [3] Inayah, Vol. IV, p. 249.

[4] Vol. IV, p. 922.

mansion by pre-emption,' it would be void. The proper time for making the demand of pre-emption in the case of an invalid sale is not that of the purchase, but when the seller's right is entirely cut off.[1] And with regard to a gift *ba-shurt-ooliwuz*, or a condition for an exchange, there are two reports, by one of which regard is to be had to the time of mutual possession, and by the other, to the time of the contract.[2] If a neighbour and a partner should hear of a sale at the same time, both being in one place, and the partner should make the demand, but the neighbour remain silent, and the partner should then waive his right, the neighbour could not take it up.[3] When a mansion is sold in which two persons have a right of pre-emption, and one of them is absent, but the other present, and the one who is present claims half the mansion under his right of pre-emption, the right is annulled. So also if both were present, and each should claim a right of pre-emption as to half, the right of both would be annulled.

Difference of opinion as to a pre emptor being obliged to act on information that has not the quality of ordinary testimony.

Knowledge of a sale is sometimes obtained by the pre-emptor himself hearing or being present at the contract, and sometimes by his receiving information of it from another. In the latter case, then, are number and justice of the informants a necessary condition, as in the case of witnesses? Upon this point there was a difference of opinion among 'our' masters, Aboo Huneefa saying that it is a condition that there should be one or other of these, that is, either number,—as of two men, or one man and two women,—or justice; while according to Aboo Yoosuf and Muhammad, neither number nor justice is required. So that if

[1] I suppose on possession being taken with the seller's permission, when the purchaser becomes the proprietor.—See M. L. S, Chap. XI.

[2] In the Doorr-ool Mukhtar (p 702), the time of mutual possession is stated absolutely without any notice of the different reports.

[3] See *ante*, p. 484.

one person were to give information of a sale, and the person entitled to pre-emption should remain silent, that right would be annulled according to them if the information should prove to be true, whether the informant were just or unjust, free or a licensed slave, adult or under puberty. Kurukhee has said that this is the most correct of the reports (or opinions). Though the information should be given by only one unjust man, yet if the pre-emptor believes him, the sale is established, on his information, according to them all; but if he disbelieves the informant, the sale is not established, according to Aboo Huneefa, though the information should prove to be true; while according to the others, it is established in that case.

Demand with invocation.

By *tulub-ish,had,* or demand with invocation of witness (also styled *tukreer*, as before mentioned), is meant a person calling on witnesses to attest his *tulub-moowathubut,* or immediate demand. The invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand, saying, 'you did not demand your right when you heard of the sale, nay, you abandoned your right and rose from the meeting;' while the pre-emptor says, on the other hand, 'I did demand it,' when, the word being with the purchaser, the *onus probandi* would be cast on the other. To give validity to the *tulub-ish,had,* it is required that it be made in the presence of the purchaser, or seller, or of the premises which are the subject of sale. And the person claiming the right of pre-emption should say, in the presence of one or other of these, 'such an one has purchased this mansion,' or 'a mansion (specifying its own boundaries), and I am its *shufee* and have demanded the pre-emption, and now do demand it: bear ye witness to this.' The making of this

demand is measured by the ability to do so. And when one is able to make the demand in the presence of one or other of these (though only by letter or a messenger),[1] and fails to do so, the right of pre-emption is annulled, to prevent injury to the purchaser. If he leave the nearest to go to one more remote, all being in the same city, the right is not annulled on a favourable construction; otherwise, if the more remote be in another city, or in one of the villages belonging to the same city. But if they are all actually in one place, and the demand is made at the more remote, abandoning the nearer, it is still lawful; unless, indeed, he has arrived at the nearer, and then gone on to the more remote, in which case the right would be cancelled. If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he please, make the demand in the presence of the seller or of the premises; or he may make it in the presence of the purchaser, though he is not in possession, because he is the actual proprietor.[2] But if possession has been taken by the purchaser, Kurukhee has said that it is not valid to take witnesses to the demand in the presence of the seller. Muhammad, however, has expressly said in the Jama Kubeer that it is lawful after delivery to the purchaser, on a liberal construction, though not by analogy. When a pre-emptor receives intelligence of a sale during the night, and is unable to go out and call upon witnesses to attest his demand, but does so as soon as it is morning, the demand is valid. But he should go out and make his demand in the morning as soon as people are stirring about their usual avocations.

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[1] Doorr-ool-Mookhtar, p. 699.

[2] The last clause is from the Doorr-ool-Mookhtar, p. 699.

The *tulub-moowathubut*, or immediate demand, is first necessary; then the *tulub-ish,had*, or demand with invocation, if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor, at the time of hearing of the sale, was absent from the seller, the purchaser, and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other.

Is not required when witnesses have been invoked to the first demand.

By the *tulub-tumleek*, or demand of possession, is meant the bringing the matter before the judge that he may decree the property to the claimant by virtue of his right of pre-emption. If he neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of pre-emption is not annulled. And though he should neglect to do so without a sufficient reason, the right would not be annulled, according to Aboo Huneefa, and Aboo Yoosuf also, by one report. And this is the manifest doctrine of the sect, the *futwa* being in accordance with it. But according to Muhammad, and Zoofr, and Aboo Yoosuf, also, by another report, if he should call witnesses to his demand, yet should neglect to sue for a month without a sufficient excuse, the right of pre-emption is annulled, and decisions are also given according to this opinion. The proper form for making the demand of possession is, for the pre-emptor to say to the judge, 'Such an one has purchased a mansion' (describing its situation and boundaries), 'and I am the *shufee* by reason of a mansion belonging to me' (the boundaries of which he should also explain). 'Order him, therefore, to deliver it up to me.' But even after this demand, the mansion does not become established as

Demand of possession.

Form of the application.

his property without an order by the judge for its delivery to him, or actual delivery by the purchaser himself. So that if before either of these take place, another mansion by the side of this mansion is sold, and the judge then passes his order, or delivery is made by the purchaser, the pre-emptor has no right of pre-emption in this other mansion. In like manner, if the pre-emptor should die or sell his own mansion after both the demands, but before the judge's order or delivery by the purchaser, the right of pre-emption would be void. And the *shufee* may refuse to take the mansion, though the purchaser should be willing to make delivery, until the judge has decreed it in his favour. If the mansion be in the possession of the seller, it is a condition to the hearing of the suit that both the seller and purchaser be present; because the pre-emptor is suing for both right and possession, the former being in the purchaser and the latter in the seller. But if the mansion be in the possession of the purchaser, his presence alone is sufficient for the hearing of the cause.

How the judge is to proceed on the application being made to him.

When the *shufee* brings his suit claiming his right of pre-emption, the judge is first to ask him, before accepting or admitting his suit against the defendant, respecting the town and *muhullah*, or sub-district, in which the mansion is situate, and its boundaries, for he is seeking to establish a right in it, and it is necessary that it be known, since a suit for what is unknown is invalid. When this has been explained, he is then to ask him whether the purchaser has taken possession or not; for when he has not taken possession the suit is not valid against him until the seller appears. When this has been explained he is to ask him the cause of his right of pre-emption, and the boundaries of the property by reason of which he founds his claim; for there are different causes of this right, and

he may perhaps be suing for one that is invalid, or he may be excluded by a person who has a preferable right. When he has assigned a valid cause, and is not excluded by any other person, the judge is then to ask him when he became acquainted with the sale, and how he acted on the occasion; for the right may be annulled by length of time or by some other objection, and this should be unfolded. When this has been explained he is to ask him about the *tulub-tukreer*, or confirmatory demand, how it was, and before whom he made the demand, and whether he was nearer or more remote than another in the manner already mentioned. When all this has been explained, and no condition is wanting, the suit is complete and to be accepted or admitted as against the defendant, who is then to be asked respecting the mansion on which the claim of pre-emption is founded, 'Is it the property of the pre-emptor or not?' even though it were in his possession, and possession is apparent evidence of right; for apparent evidence is not sufficient, and the right must be established by proof as the basis of the right of pre-emption. The defendant is accordingly to be asked regarding it, and if he denies the property, the judge is to say to the plaintiff, 'Produce proof that it is thy property,' and if he fail to do so, and demands the oath of the purchaser, the oath is to be put in these words, 'By God, you do not know that he is the proprietor of this on which he grounds his claim of pre-emption.' If the purchaser refuses the oath, or the pre-emptor produces proof, or the purchaser acknowledges the right, the pre-emptor's title is established to the mansion on which he founds his claim; and after this the judge is to ask the purchaser, saying, 'Have you purchased or not?' If he deny the purchase, the judge is then to say to the

claimant, 'Produce proof that he has purchased,' and if he is unable to do so, and demands the oath of the purchaser, the oath is to be put to him in these words, 'By God, I have not purchased,' or, 'By God, he has no right of pre-emption against me in this mansion as he has mentioned.' This would be putting the oath as to the result, which is in conformity with the opinion of Aboo Huneefa and Muhammad, while the other mode would be to put it as to the cause, which is agreeable to the opinion of Aboo Yoosuf. If he refuse the oath or acknowledge the purchase, or the pre-emptor adduces proof of it, decree is to be given in his favour, the right being made manifest by proof. With regard to the proof of the pre-emptor's being neighbour to the purchased property, it is required that the witnesses should testify that 'This mansion, which is in the vicinity of the purchased mansion, has been the property of this pre-emptor before this purchaser purchased this mansion, and that it is his up to this time; we do not know that it has gone out of his ownership.' But if they should say that 'This mansion is to this neighbour,' it would not be sufficient; though if they should say that 'The pre-emptor bought this mansion from such an one, and it is in his possession,' or that 'such an one gave it to him,' the testimony would be sufficient.

OF DEVICES BY WHICH THE RIGHT OF PRE-EMPTION MAY BE EVADED.

(*Baillie's Digest of Muhammadan Law, pp.* 512 *to* 514.)

SOME[1] of these are employed to prevent liability to the right of pre-emption, and some to diminish the desire of the pre-emptor to avail himself of it. Among them are the following:—1st. The seller may give the mansion to the purchaser, calling on witnesses to attest the transaction; and the purchaser may then give the price to the seller, also calling on witnesses to attest the transaction. Pre-emption does not attach in such a case, because the right to it is confined to contracts of exchange; and gift, when not made originally on condition of an exchange, does not become such a contract by the subsequent delivery of an exchange. But this device is necessarily restricted to persons who are competent to make a gratuitous disposal of property, and would not be available to fathers or executors selling their wards' property, or to an agent selling that of his principal. 2nd. A *mouza*, or place in a mansion, may be separated and marked off with a line, and bestowed by way of *sudukah* (charity), or of gift, with its right of way, and then the remainder of it sold,—by which means the right of the pre-emptor is evaded. The marking off or circumscribing is to prevent the gift from being the gift of a *moosha*, or undivided share, in property that is susceptible of division; and the right of pre-emption is prevented by the purchaser's becoming a partner,[2] and as such, having a preferable right to the neighbour's. It is made a condition that the *sudukah*, or gift of the *mouza*, should be made with its right of way, because, otherwise, the person in whose favour it is made would be only a neighbour to the purchased property, and as such have no

[1] Fut. Al, Vol. VI, p. 596.

[2] That is, in the way; more properly a *khuleet*.

preferential right over another neighbour. This device, it may be observed, is only proper for defeating the right of a neighbour, not that of a *khuleet*. 3rd. With regard to vineyards and lands, if a device is required to prevent liability to the right of pre-emption, the trees may be sold or given, with their foundations, and then the purchaser will become a partner in the property, and may afterwards purchase the remainder; or, if a device is sought for lessening the pre-emptor's desire to assert his right, the trees may be sold, first at a low price, and then the lands may be bought by the purchaser of the trees at a high price. 4th. When a purchase is intended for a hundred *dirhems*, it may be made openly for a thousand or more, and then the purchaser may give the seller a piece of cloth, of the value of a hundred, in lieu of the price; whereupon, if the pre-emptor should come to make his claim, he must take the purchase at the ostensible price, which its magnitude will disincline him to do. 5th. The seller and purchaser may declare that the sale was invalid, or a *tuljeea*,[1] or with a condition of option to the seller, and their declaration must be accepted, which being the case, there is no room for a claim of pre-emption, for it is well known that to found such a claim it is necessary that there be an entire cessation of the seller's right for a valid cause. 6th. When a man sells his mansion, excepting the breadth of a cubit along the boundry of the pre-emptor, the latter has no right of pre-emption, because his neighbourhood is cut off; and this is a device by which his right may be evaded. In like manner, when such an extent is given to him, and delivered, the pre-emptor's right is evaded, for the same person.[2]

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[1] See M L. S., p 304.

[2] Hidayah, Vol IV, p 953. This device, however, is imperfect, for it leaves the slip undisposed of.

CONSUMMATION OF MARRIAGE, OR VALID RETIREMENT.

(*Rumsey's Muhammadan Family Inheritance, pp.* 358 *to* 360.)

RETIREMENT, under ordinary circumstances, is equivalent to actual consummation of the marriage; and it has an important bearing on questions of dower, in consequence of the following principles. Dower is considered to be earned[1] by consummation or retirement, or to be due on the husband's death, if he happen to die without consummation or retirement and without having divorced the wife; but if he divorce the wife without consummation or retirement, she is only entitled to half. In like manner, if a less dower than ten dirms be specified, she will be entitled to five dirms in case of divorce without consummation or retirement.[2] It consequently becomes important to consider what constitutes valid retirement.

Retirement, in the usual sense of complete retirement,[3] is the circumstance of a woman being alone with the husband at such a time and place that there is no bar to caution, so as to give him an opportunity of having sexual intercourse with her. By such retirement the wife is considered to perform her part of the contract, for it is the husband's own fault if he omit to have connection; and complete retirement is thus, as we have seen, equivalent to actual coition for the purpose of a right to dower.[4] Retirement is incomplete, and therefore ineffectual, when

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[1] *i. e.*, the woman's title is complete; the dower is not necessarily payable at once. *Vide infra*, 361, &c., as to prompt and deferred dower, &c.

[2] Hed. ii, iii, 3—5, 11.

[3] In the Hedaya, and also in these pages the word may be taken in this sense when there is nothing in the context to show that it is to include incomplete retirement.

[4] *Vide supra* 358.

there are circumstances which constitute a bar to coition; and this is the case when one of the parties is sick, or fasting in the month of Ramzan, or is in the *ihram* of a pilgrimage; whether voluntary or obligatory, or of an *amrit* (visitation to the shrine of the Prophet), or when the woman is in her courses. Consequently, if the husband divorce the wife after such retirement only, she is entitled to only half, her specified dower, being deemed to have been divorced before consummation. It may be noted that the fact of the husband being an *ineen*, or person naturally impotent, is not considered a bar to coition,[1] so that if a woman retire with such a person she will be entitled to her whole specified dower. And Abu Hanifa maintains that the law is the same with respect to a *majboob* eunuch, or man who has been made an eunuch by the amputation of the genital organ; but Abu Yusuf and Muhammad oppose this view and maintain that the wife only takes half. And it may also be mentioned that a *nifl* (voluntary) fast, a fast of atonement, or a fast in consequence of a vow, is no bar to complete retirement.[2]

It is important to remember that, in the case of an invalid marriage, retirement, even when complete, affords no presumption of coition.[3]

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[1] Apparently because the woman has done her part, and ought not to be deprived of the consideration by a circumstance over which she has no control.

[2] Hed. ii, iii, 12—14; *vide* also Hed. iv, xi, 2.

[3] Hed. ii, iii, 25. See further as to invalid marriages, *infra*, 367, &c.

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